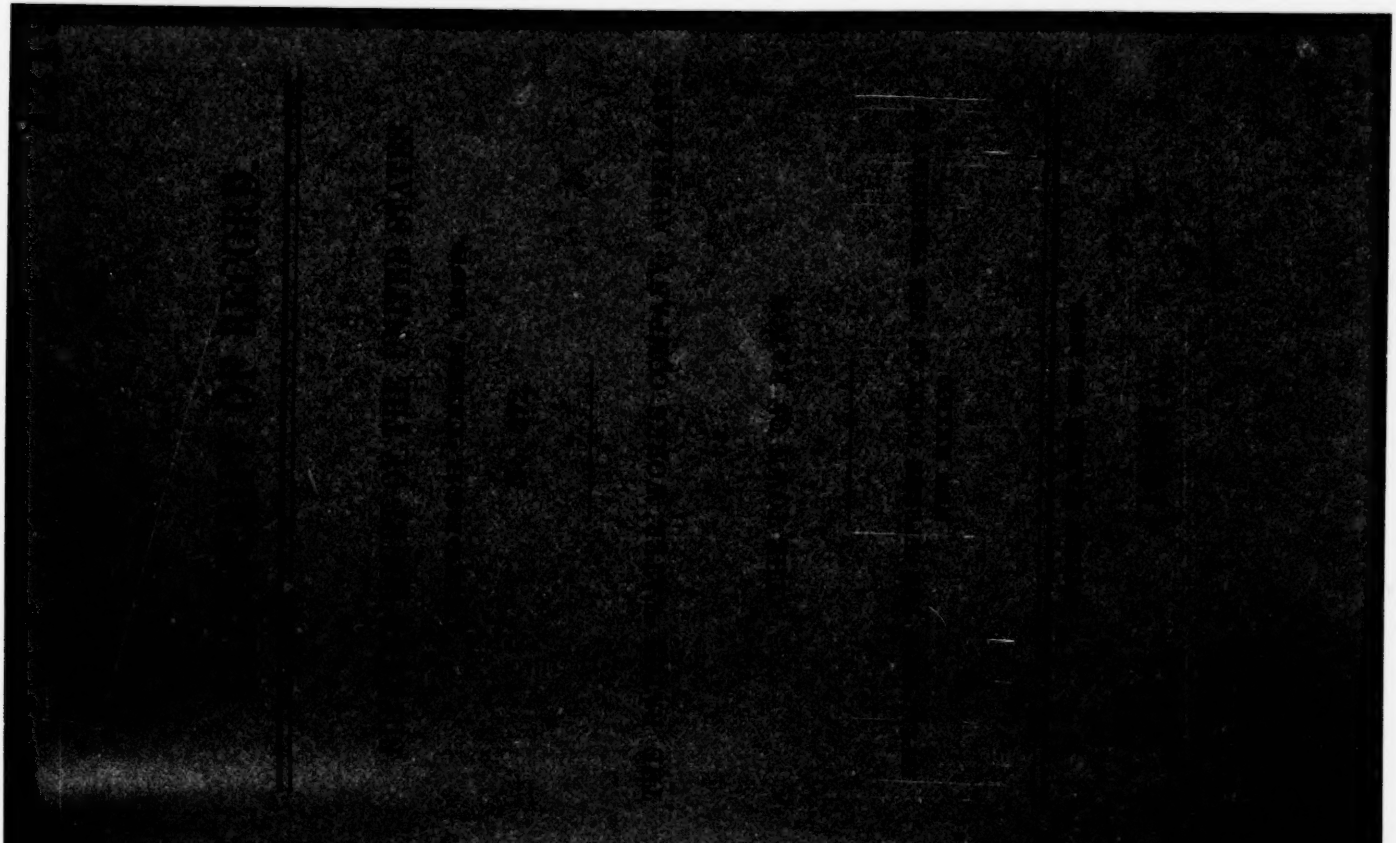

(16,837.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 272.

THE RATON WATER WORKS COMPANY, APPELLANT,

vs.

THE TOWN OF RATON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 17, 1898.

1 In the Supreme Court of the Territory of New Mexico.

Be it remembered that on February 1st, 1897, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a transcript of record, which said transcript is in the words and figures following, to wit:

2 TERRITORY OF NEW MEXICO, }
County of Colfax. }

In the District Court, Fourth Judicial District.

RATON WATER WORKS CO. }
vs. } No. 1888. Specific Performance.
TOWN OF RATON. }

To the Hon. Thomas Smith, chief justice of the supreme court of the Territory of New Mexico and judge of the district court within and for the county of Colfax:

Your orator, The Raton Water Works Company, a corporation organized and existing under and by virtue of the laws of the Territory of New Mexico, brings this, its bill of complaint, against The Town of Raton, a municipal corporation organized and existing under and in pursuance of the laws of said Territory, defendant herein, and thereupon humbly complaining, your orator shows unto your honor that, heretofore, to wit, on July 24, 1891, the said defendant, acting under and in pursuance of the laws of said
3 Territory, made and entered into a certain contract and agreement with your orator, the terms and conditions whereof were and are set forth and embodied in a certain public ordinance of the said town, duly enacted and passed by the board of trustees thereof, the same being ordinance No. 10 of said town, granting franchise to the Raton Water Works Company to erect and maintain water works, and published July 24th, 1891, and which said ordinance was duly ratified and confirmed at an election held in the said town of Raton on the 1st day of August, 1891, by a vote of the duly qualified electors of said town, in pursuance of the requirements of law in relation thereto, *and which said ordinance became and was and is valid and operative and in full force and effect.*

Your orater further states that within thirty days thereafter, your orator did file with the town recorder of the said town of Raton its acceptance in writing of all the terms, provisions and conditions of the said ordinance, which said acceptance was duly acknowledged by defendant and all requirements of law and of said ordinance were fully and duly complied with, *and the said contract and ordinance became and was and now is, in all respects, valid and obligatory upon both of said parties thereto.*

Your orator further states that in and by the said contract and agreement, so embodied in said ordinance, a copy whereof is herewith filed and made a part of this bill of complaint, the same being

marked Exhibit "A" for identification, it was contracted and agreed that your orator should lay main pipes along and through
4 the streets of said town, as the board of trustees thereof might order, substantially, as follows:

From Apache avenue along Railroad avenue to Savage avenue; from Apache avenue along Santa Fe avenue to Moulton avenue; from Galisteo avenue along Topeka avenue to Moulton avenue; from Mora avenue along Atchison avenue to Moulton avenue; from Mora avenue along Tunnel avenue to Miembres avenue; from Apache avenue along Raton avenue to Miembres avenue.

Also one main pipe for the accommodation of the people living in that portion of the town east of Railroad avenue.

And the board shall locate the twenty-five hydrants hereinafter provided for, along the mains aforesaid, taking into consideration those already located, and shall notify said water company before said mains are laid, the places where such hydrants shall be erected.

And it was thereby further provided that "Sec. 4. Said Raton Water Works Company, its successors or assigns, shall lay and extend pipes for carrying said water to any part of the aforesaid town when requested so to do by the board of trustees; *Provided*, persons owning property along the line of such proposed extensions shall take a reasonable amount of water, and *provided* also, that there shall be ordered set in each street or lane by said trustees, on which said company or its assigns, shall be required to lay pipe, one hydrant for every eight hundred feet of main pipe so laid or extension ordered. It is understood, however, that no hydrants will
5 be paid for by the town upon any of the extensions of the pipes not ordered by the trustees."

And in and by the said contract and ordinance, it was further contracted and agreed that: "That in consideration of the benefits that would accrue to the said town of Raton and its people, by the erection and operation of said water works, and for the better protection of the said town against fires, the said town of Raton did thereby agree and bind the said town to rent from the said Raton Water Works Company or its assigns, for the term of twenty-five years thereafter, twenty-five hydrants for the purpose of extinguishing fires, and for purposes pertaining to the fire department of said town, flushing sewers and irrigating public school grounds and parks, and the said town by the boa-d of trustees thereof did thereby agree and bind the said town to pay to your orator or its assigns at the rate of $100.00 per year for each of said twenty-five hydrants."

And the said town did thereby further contract and agree to pay to your orator or its assigns the sum of $75.00 per year for each hydrant for the next twenty-five additional hydrants that might be ordered set and erected by the board of trustees of said town, and fifty dollars per year for each subsequent hydrant ordered set and erected thereafter by said board of trustees. And it was further thereby provided that your orator should erect and maintain at all times in good repair, double-discharge fire-hydrants, with four-inch

connections to the main pipe, and two and one-half inch hose connections with each hydrant.

6 And in and by said ordinance and contract it was further contracted and agreed that the defendant, The Town of Raton, should and would pay to your orator as follows, to wit: on the first day of January and July of each and every year, one-half of the amount of said rental for said hydrants, so, as aforesaid erected and maintained by your orator at the annual rental thereof, hereinbefore mentioned, and at the said rates and periods for all such additional hydrants as might thereafter be erected and maintained by your orator, under and in pursuance of said contract and agreement.

Further complaining, your orator states that it has, in all respects, fully performed and complied with the terms and conditions of said contract upon its part, and that thereafter, in pursuance thereof, your orator did lay mains in and upon the following streets, as provided for in section No. 3 of said ordinance and contract, to wit: From Apache avenue along Railroad avenue to Savage avenue; from Apache avenue along Santa Fe avenue to Moulton avenue; from Galisteo avenue along Topeka avenue to Moulton avenue; from Mora avenue along Atchison avenue to Moulton avenue; from Mora avenue along Tunnel avenue to Miembres avenue; and from Apache avenue along Raton avenue to Miembres avenue; also a main pipe along the principal street on the east side of the railroad in said town. Your orator further states that on the 9th day of May, 1892, the board of trustees of said town issued an order under the conditions of said contract, ordered fire hydrants or plugs

7 to be set in addition to the fire hydrants or plugs already set on the southeast corner of the following blocks, in the Maxwell north addition to said town, to wit: Blocks 1, 2, 3, 4, 5, 6, 7, 10, 11 and 13, and of the following blocks in the town-site addition to said town, to wit: Blocks 1, 2, 3, 4, 8, 7, 6, 5, 44, 9, 10, 11, 12, 13, 18, 17, 16, 15, 14, 21, 22, 25, 24, 32 and 33, and on the following blocks in the Maxwell west addition to said town, to wit: Blocks "N" and No. 1, a copy of said order being hereto attached and made part of this bill of complaint and marked Exhibit "B" for identification.

Your orator further represents that on the 20th day of June, 1892, said board of trustees ordered your orator to extend the first street or Railroad Avenue main to Rio Grande avenue to the second street or Santa Fé Avenue main to the middle of block No. 30, and that a fire-hydrant be set at the southeast corner of block 27, a copy of which said order is hereto attached, made a part of this bill and marked for identification, Exhibit "C." All of which said orders were fully complied with by your orator.

Your orator further represents that in pursuance of the conditions of said ordinance, 1,300 feet of water main were laid on said street in that portion of the town lying east of the railroad, on which there were set two hydrants, making in all, hydrants set by your orator, forty-four.

Your orator further states that the board of trustees of said

8 town appointed a committee to investigate the plant of your orator, and the said committee on the 15th day of October,

1892, reported to said board of trustees that their plant had been constructed practically in accordance with the ordinance and recommended that the same be accepted by the said town of Raton under the conditions of the said contract or ordinance, and by resolution of that date said plant was accepted by said town, a copy of said report and resolution being hereto attached and made a part of this bill and marked Exhibit "D" for identification.

And your orator further represents that in accordance with said contract and agreement your orator proceeded, within the time specified in said ordinance, to construct said water works at a large expenditure of money, to wit: $115,000; that your orator constructed a reservoir with a capacity of 42,000,000 gallons of water, and laid six and seven-tenths miles of water main of eight-inch capacity into said town, in addition to the mains laid in said streets, and had the same completed and in operation in supplying water to said town and its inhabitants within the time prescribed by the said ordinance, contract and agreement, and since that time has strictly complied with and carried out the terms of the said agreement under the terms of said ordinance, and had, prior to January 1st, 1895, placed, constructed and erected forty-four hydrants, and has ever since maintained the same for the use of the said defendant, and the said defendant has possessed and used the same under and by virtue of said contract.

9 And your orator states and charges that by reason of the premises and in pursuance of said contract and ordinance, it became and was and now is the duty of the said defendant to pay to your orator, as rental for the said hydrants, the just and full sum of $1,962.50 on the 1st day of January and July of each year thereafter, and for that purpose to levy and collect a tax sufficient for said purpose.

Your orator further states that prior to the 1st day of April, 1895, the fiscal year of said town of Raton commenced on the 1st day of April in each year, in pursuance of law, and that it became and was the duty of the board of trustees of said town, within the last quarter of each fiscal year, to pass an ordinance to be termed "the annual appropriation bill for the next fiscal year," and thereby to appropriate such sum of money as was necessary to defray the expenses and liabilities of such corporation, and to include therein the amount necessary to make the said semi-annual payments to your orator for the rental and use of said hydrants hereinbefore mentioned. And your orator further states that in pursuance of the said duty, so imposed by law, the board of trustees of said town of Raton did, on, to wit: March 18th, 1895, and within the last quarter of such fiscal year, enact and pass an ordinance entitled "An ordinance relating to tax levy and appropriations for the years 1895 and 1896," the same being No. 59, a copy whereof is hereto attached, marked Exhibit "E" and made a part of this bill of complaint, and did thereby appropriate out of moneys and revenues covered

10 into the treasury of said town or to be collected and paid into the same, from any and all sources, during the fiscal year commencing on the 1st day of April, 1895, whether the same

might be derived from taxes, licenses, fines, fees or any other source whatsoever, among other purposes and objects, the sum of $4,735.15 for the payment of the amount then due and payable to your orator, under and by virtue of the ordinance and contract before mentioned, and did thereby further appropriate the sum of $3,925.00 for the payment to your orator for hydrants so set and provided by your orator, as aforesaid, for the year commencing January 1st, 1895, to wit: $4,735.15, and the said board of trustees did issue to your orator warrants of said town as follows, to wit: Warrant No. 536, dated January 1st, 1895, due six months after date, for the sum of $609.37; warrant No. 537, dated January 1st, 1895, due six months after date, for the sum of $500; warrant No. 538, dated January 1st, 1895, due October 1st, 1895, for the sum of $609.38; warrant 539, dated January 1st, 1895, due October 1st, 1895, for the sum of $500; warrant No. 540, dated January 1st, 1895, due January 1st, 1896, for the sum of $609.37; warrant No. 541, dated January 1st, 1895, due January 1st. 1896, for the sum of $500; warrant No. 542, dated January 1st, 1895, due April 1st, 1896, for the sum of $609.38; warrant No. 543, dated January 1st, 1895, due April 1st, 1896, for the sum of $500; all of said warrants bearing interest at the rate of ten per cent. from date. Warrant No. 544, dated March 18, 1895, payable on
11 demand, for the sum of $297.65, for interest due on account up to January 1st, 1895. Each of which said warrants was duly drawn on the treasurer of the town of Raton, signed by the mayor and countersigned by the recorder of said town.

Your orator further states that in pursuance of law it was the duty of the treasurer of the said town to have and keep in his office a book to be called "The Registry of Town Orders," wherein should be entered and set down, at the date of the presentation thereof, each of said warrants, and to pay out of the funds of said town, in his hands for disbursement, the amount of each of said warrants, in the order in which the same were presented to him for payment.

Your orator further states that it was the duty of said town to collect the amount of all town licences in lawful money and not otherwise, and to apply the amounts so collected to the payment of lawful warrants of said town in the order of their presentation for payment, as aforesaid.

Further complaining your orator states that the board of trustees of the said defendant, not regarding the contract and agreement aforesaid, wrongfully and without authority of law, did on, to wit: May 23, 1895, enact and pass an ordinance entitled: "An ordinance relating to tax levy and appropriations for the years 1895 and 1896," being ordinance No. 64 of said town, a copy whereof is filed herewith, marked Exhibit "F," which is referred to and made a part of this bill, and it thereby, among other things, pretended to enact and ordain that the ensuing fiscal year of said town
12 should commence on the 1st day of June, 1895, and end on the 31st day of May, 1896, and that any moneys received or expended during the months of April and May, 1895, should be included in the receipts and expenditures of the fiscal year commencing June 1st, 1895, and did thereby undertake and pretend to

appropriate out of moneys and revenues of the said town, during the said fiscal year last before mentioned, among other purposes, the sum of $1,500, to supply the said town with water, and did thereby undertake and pretend to repeal the said ordinance No. 59, hereinbefore mentioned, and the said appropriations thereby made for the payment of your orator for the rental of said hydrants, as hereinbefore set forth.

Your orator further states and charges that the said last-mentioned pretended ordinance, hereinbefore mentioned, in so far as the same is in conflict with the terms and provisions of said ordinance No. 59, was and is invalid, illegal and void.

Your orator further states that on, to wit: June 12, 1895, the board of trustees of said defendant, enacted and passed an ordinance entitled, "An ordinance relating to receiving town warrants in payment of town licences," the same being No. 65 of said town, and a copy whereof is filed herewith, marked Exhibit "G" and made a part hereof, and did thereby pretend to ordain and enact that all the warrants of said town which should be issued after June 1st, 1895, should be received in payment of all town licenses, and your orator states and charges that the said last-mentioned pre-
13 tended ordinance was and is invalid, illegal and void as against your orator and other holders of warrants of said town, then outstanding and unpaid.

Your orator further states that warrants Nos. 536 and 537, described as aforesaid, were duly presented to the town treasurer for registration, after they became due, and were refused registration by the said town treasurer.

Your orator further states that, although requested so to do, the defendant has refused and now refuses to perform the said agreement upon its part, and to pay to your orator the said semi-annual rental, so set and provided by your orator, at the said periods when the same became due, and as the same will hereafter accrue, in pursuance of said contract, and that your orator has fully performed the said agreement upon its part, and the said defendant has been and now is in the possession, use and enjoyment of the said water plant, under said contract.

Your orator further states that in addition to the amount of said rental, payable to your orator on and prior to January 1st, 1895, as hereinbefore stated, there became due to your orator the sum of $1,962.50 on July 1st, 1895, and that there will accrue and become due to your orator on the 1st day of January and July in each year during the continuance of said contract, the like sum of $1,962.50; and your orator states that the said defendant refuses to pay the said amounts heretofore accrued and payable to your orator, and refuses to pay the said several amounts which will hereafter accrue to your orator, and gives out and pretends that the said con-
14 tract is inoperative and invalid and refuses in any respect to perform the same upon its part. By reason whereof your orator will sustain great and irreparable injury, and it will become necessary to institute a multiplicity of suits upon the said agreement for the enforcement of payment of said semi-annual rental,

which has heretofore become due and which shall hereafter become due.

Your orator therefore prays that the town of Raton be made a party defendant to this bill, and that it be required to full, true and perfect answers make to all and singular, the allegations hereof, but without oath, (answer under oath being hereby expressly waived); and that the said defendant may be decreed specifically to perform the said contract and agreement entered into with your orator as aforesaid, and to pay the amounts of said rental of said hydrants, which has heretofore accrued and become payable, and which may hereafter accrue and become payable, in pursuance of the terms of said contract and agreement; and that said defendant may be ordered and enjoined from enforcing said ordinance No. 64 of said town, and from fixing the commencement of the fiscal year of said town on June 1st, 1895, and from enforcing the pretended repeal thereunder of the said appropriation in favor of your orator under said ordinance No. 59 and that said defendant be ordered and enjoined to refrain from enforcing said ordinance No. 65, and from receiving town warrants of said town in payment of all town licenses thereunder; and that your orator may have such other and further relief as may be equitable and proper.

15 May it please your honor to grant unto your orator the writ of subpœna out of this honorable court, commanding and requiring the defendant, The Town of Raton, to be and appear before this honorable court under a certain penalty, therein named, on the first Monday in September, next, then and there to answer this bill and to stand to, abide and perform the order and decree of this court in the premises.

May it please your honor to grant unto your orator the writ of injunction out of this honorable court enjoining and restraining the defendant to refrain from enforcing the said ordinance No. 64 of said town, until the further order of this court, and that upon final hearing, said injunction be made perpetual.

ALVA L. HOBBS,
Secretary of the Raton Water Works Company.

WARREN, FERGUSSON & GILLETT,
A. C. VOORHEES,
WM. C. WRIGLEY,
Solicitors for Complainant.

TERRITORY OF NEW MEXICO, }
County of Colfax, } *ss:*

Alva L. Hobbs, being duly sworn says that he is the agent of the complainant in this behalf, and that he has heard the above and foregoing bill of complaint read and knows the contents thereof, and that the matters and things therein stated are true of his

16 own knowledge, except as to those matters therein stated upon information and belief, and as to those matters, he believes them to be true.

Subscribed and sworn to before me this 24th day of August, 1895.
DAVID G. DWYER,
Notary Public.

Warrant No. 642, for 409.30, issued August 2nd, 1895, was paid August 2nd. This warrant was issued against fund on hand out of $1,500 apportionment under ordinance 64.

EXHIBIT B.

MAYOR'S OFFICE, RATON, N. M., *May 9th*, 1892.

To the Raton Water Works Company:

At a regular meeting of the Raton board of trustees, held in council-room May 9th, 1892, the following motion was passed:

That the Raton Water Works Company be requested to locate fire-plugs on the southeast corners of the following blocks, viz: Maxwell north addition, blocks Nos. 1, 2, 3, 4, 5, 6, 7, 10, 11 and 12.

Townsite addition, blocks Nos. 1, 2, 3, 4, 8, 7, 6, 5, 44, 9, 10, 11, 12, 13, 18, 17, 16, 15, 14, 21, 22, 25, 24, 32 and 33.

Maxwell west addition, blocks Nos. "N" and No. 1, (32 17 new plugs and 5 old ones) and that said company be furnished a copy of this motion. Carried.

(Signed) J. JELPS,
[SEAL.] *Notary Public.*

Attest:
H. W. CARR, (Signed)
Recorder.

EXHIBIT C.

RATON, NEW MEXICO, *June 30th*, 1892.

Mr. J. Cox, engineer Raton Water Company:

At a special meeting of the board of trustees, seconded by Stevens, that the committee on water-main extensions notify the Raton Water Company to extend the First Street main to Rio Grande avenue, and the Second Street main to the middle of block No. 30, and that a fire-plug be placed at the southeast corner of block No. 27.

[SEAL.] (Signed) WM. TINDALL, *Mayor.*

H. W. CARR, (Signed)
Recorder.

EXHIBIT D.

RATON, NEW MEXICO, *October 15th*, 1892.

Raton Water Works Company, Raton, New Mexico:

The following is a copy of the report of J. Jelfs and C. L. Wray, appointed by the mayor as a committee of two to investigate the Raton Water Works Company plant.

18 To the board of trustees of the town of Raton:

We, the undersigned, J. Jelfs and C. L. Wray, report that we have examined the plant put in by the Raton Water Works Company, and as far as we have been able to determine, find that the plant has been constructed practically according to ordinance No. 10, and understanding the same has been approved and accepted by the A., T. & S. F. R. R. Company on their part, we recommend that the same be accepted by the town of Raton, subject to the provisions of aforementioned ordinance No. 10.

Resolved, That the water plant as constructed by the Raton Water Works Company, be accepted and said acceptance to date from the 1st day of July, 1892.

[SEAL.] H. W. CARR, *Recorder*.

EXHIBIT E.

No. 59.

An Ordinance Relating to Tax Levy and Appropriations for the Years 1895 and 1896.

Be it ordained by the board of trustees of the town of Raton:

SECTION 1. That the general tax levy for the town taxes for the fiscal year commencing on the 1st day of April, 1895, shall be and is hereby declared to be ten mills for and upon every one dollar (1.00) of assessable property, both personal and real, within the corporate limits of the town of Raton, the same to be assessed and collected according to law.

19 SEC. 2. There is hereby appropriated out of money and revenues covered into the town treasury, or to be collected and paid into the same, from any and all sources, during the fiscal year commencing on the 1st day of April, 1895, whether the same be derived from taxes, licenses, fines, fees or any other source whatsoever for the following purposes and objects, the following sums and amounts, to wit:

To pay all outstandings indebtedness of the town the following amounts:

Amount due the Raton Water Works Company, up to January 1st, 1895	$4,735.15
Amount due Denver Clay & Tile Co	600.00
Amounts due Oldham Brothers, S. Dillman, W. Tuite, J. W. Crouse, D. G. Droyer, J. S. Gray	1,348.94
Amount due Atchison, Topeka and Santa Fe Railway Co., for fire-hose	306.00
Amount to pay water works Co., for fire-hydrants, for the year commencing January 1st, A. D., 1895	3,935.00
Amount for salary of town marshall	600.00
Amount for salary of town recorder	200.00
Amount for salary of town treasurer	50.00
Amount for repairs of street- and alleys	300.00
Amount for twenty-four-inch tile colverts, for streets	300.00

Amount for rent and fuel for counsel chambers		200.00
Amount for man in charge of fire-hose house		60.00
Amount for removing garbage.....		600.00
20 Amount for miscellaneous appropriation.....		765.00

SEC. 3. That so much of the unexpended appropriations, on account of furnishing electric lights for the streets for the year ending March 31st, 1895, namely: $1,200.00, and of the unexpended balance for its appropriations for sewers and sidewalks, viz: $800.00, made for the year ending March 31st, 1895, shall be transferred to the miscellaneous fund for the year ending March 31st, 1895, and the balance or unexpended portion of all other appropriations be and is hereby distributed *pro rata*, to the credit of all the appropriations for the year commencing April 1st, 1895.

SEC. 4. That all moneys collected from all sources, shall be distributed and credited by the town treasurer in the following manner, viz: Sixty per cent. to be placed to the credit of the appropriations made for outstanding indebtedness, *pro rata* to the different items of indebtedness, and forty per cent. of the amounts so collected, shall be placed to the credit of the different appropriations for current expenses for the year commencing April 31st, 1895. All money so collected shall be distributed *pro rata* to the credit of the different appropriations.

SEC. 5. The balance of all moneys coming into or belonging to the town treasury, shall constitute and be a general fund from which shall be paid all debts, claims, contracts, salaries or obligations legally created or arising for the payment of which no special appropriation shall have been made.

21 SEC. 6. All bills, accounts, claims and obligations allowed and paid during the coming fiscal year shall be paid by warrants regularly drawn on the treasury and ever- such warrant shall show upon its face the fund or appropriation to which it is chargeable and from which it shall be paid, and the treasurer shall pay the same out of the funds so designated, and no other.

SEC. 7. Any balance remaining in the hands of the town treasurer at the close of the ensuing year on said treasurer's books to a particular fund or appropriation, may be by resolution of the board, turned over to, or carried into the general fund for the next succeeding fiscal year and become again subject to legal appropriation.

SEC. 8. The ensuing fiscal year shall commence on the 1st day of April, A. D. 1895, and shall end on the 31st day of March, A. D. 1896.

SEC. 9. This ordinance shall take effect and be in force five days from and after its passage and publication.

(Signed) JOSEPH W. DWYER, *Mayor.*

J. H. KLEINTZ, *Recorder.*

Passed March 18th, 1895, published March 21st, 1895.

EXHIBIT F.

No. 64.

An Ordinance Relating to Tax Levy and Appropriations for the Years 1895 *and* 1896.

Be it ordained by the board of town trustees of the town of Raton:

22 SECTION 1. That the general tax levy for the town tax for the fiscal year commencing on the 1st day of June, A. D. 1895, shall be and is hereby declared to be eight mills for and upon every dollar of assessable property, both real and personal, within the corporate limits of the town of Raton, the same to be assessed and collected according to law.

SEC. 2. That a special levy of two mills for the purpose of supplying the said town of Raton with water for town purposes for the fiscal year commencing on the 1st day of June, 1895, is hereby levied upon every one dollar of assessable property, both real and personal, within the corporate limits of the town of Raton, the same to be assessed and collected according to law.

SEC. 3. There *is* hereby appropriated out of moneys and revenues now in the town treasury or to be collected and paid into the same from any and all sources during the fiscal year commencing on the 1st day of June, A. D. 1895, whether the same be derived from taxes, licenses, fines, fees, or any other source whatsoever for the following proposes and objects, the following sums and amounts, to wit:

To supply the town with water	$1,500.00
Amount due Denver Clay & Tile Company	600.00
Amounts due Oldham Bros., S. Dillman, W. Tuite, J. W. Crouse, D. G. Dwyer, J. S. Gray and A. K. Letton	1,348.90
Amount due Atchison, Topeka & Santa Fe R. R. Co., for fire-hose	306.00
23 Amount of salary for the town marshal	600.00
Amount of salary for town recorder	300.00
Amount of salary of town treasurer	100.00
Amount for repairs of streets and alleys	300.00
Amount for ten-inch sewer pipe for extension of sewer across R. R. track	300.00
Amount for rent and fuel for council chamber	200.00
Amount for man in charge of fire-hose house	60.00
Amount for removing garbage	600.00
Amount for miscellaneous appropri-ons	765.00

SEC. 4. The balance of all moneys coming into or belonging to the town treasury shall constitute and be a part of the fund for miscellaneous appropriation, from which shall be paid all debts, claims, contracts, salaries and obligations, legally created or arising for the payment of which no special appropriation shall have been made.

SEC. 5. All bills, accounts, claims and obligations allowed and

paid during the coming fiscal year shall be paid by a warrant regularly drawn on the treasurer, and every such warrant shall show upon its face the fund or appropriation to which it is chargeable and from which it shall be paid, and the treasurer shall pay the same out of the funds so designated, and no other.

SEC. 6. Any balance remaining in the hands of the town treasurer at the close of the ensuing year and accredited on the treasurer's books to a particular fund or appropriation, may be by reso-
24 lution of the board, turned over to or carried into the general fund for the next succeeding fiscal year and become again subject to legal appropriation.

SEC. 7. The ensuing fiscal year shall commence on the 1st day of June, A. D. 1895, and shall end on the 31st of May, A. D. 1896.

SEC. 8. Any moneys received or expended during the months of April and May, A. D., 1895, shall be included in the receipts and expenditures of the fiscal year commencing June 1st, 1895.

SEC. 9. All ordinances and parts of ordinances in conflict herewith are hereby repealed.

SEC. 10. This ordinance shall take effect and be in force five days from and after its passage and publication.

(Signed) P. P. FANNING, *Mayor.*

Attest:

JULES H. KLEINZ, (Signed)
Recorder.

EXHIBIT G.

No. 36.

An Ordinance Relating to Receiving Town Warrants in Payment of Town Licenses.

Be it ordained by the board of town trustees of the town of Raton:

SECTION 1. That from and after the date of the passage and publication of this ordinance all the town warrants issued after June 1st, 1895, shall be received in payment of all town licenses.

SEC. 2. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed.

25 SEC. 3. This ordinance shall be in full force and take effect five days after its passage and publication.

(Signed) P. P. FANNING.

Attest:

JULES H. KLEINZ, (Signed)
Recorder.

Passed June 12th, 1895.

And afterward, to wit: on the 19th day of November, 1895, there was filed in said clerk's office the answer of respondent, which is in words and figures as follows, to wit:

In the District Court, Fourth Judicial District.

THE RATON WATER WORKS CO.
vs.
THE TOWN OF RATON.

The Answer of The Town of Raton, the Defendant, to the Bill of Complaint of The Raton Water Works Company, the Complainant.

This defendant reserving to itself all right of exception to the bill of complaint for answer thereto, says:

It admits that it is a municipal corporation, organized and existing under and in pursuance of the laws of the Territory of New Mexico.

It admits the enactment and passage by the board of trustees of the town of Raton, of ordinance No. 10, referred to in complainant's bill and attached to said bill as Exhibit "A" and further
26 admits that said ordinance was ratified and confirmed as charged in said bill, and that complainant's acceptance of the same was filed with the town recorder of said town of Raton as charged in said bill.

Defendant denies that said ordinance became and was and now is valid and operative and in full force and effect and obligatory upon both of the parties to this cause.

Defendant admits that said contract marked Exhibit "A" as part of complainant's bill is in words and figures practically as alleged in said bill, but for greater certainty therein prays leave to refer to the said ordinance or contract when the same shall be produced.

Defendant admits that complainant has, as alleged in said bill of complaint, complied with the terms and conditions of said contract, and has laid pipes, mains, fire hydrants and plugs as alleged in said bill.

Defendant admits the issuance of orders marked Exhibit "B" and "C" as alleged and for greater certainty there- prays leave to refer to said orders when the same shall be produced.

Defendant admits that the board of trustees of the town of Raton, on or about the date mentioned in said bill, appointed a committee to investigate complainant's plant, and it further admits that said committee reported in manner and form as allowed in said bill, and that by resolution, as alleged, said plant was accepted, but
27 for greater certainty therein defendant prays reference to said report and resolution, identified as Exhibit "D" when the same shall be produced.

Defendant further answering, says that it may be true as alleged in complainant's bill that complainant has constructed said water works at an expenditure of $115,000.00; that complainant's reservoir has the capacity alleged and that defendant has laid the number and character of water mains, in addition to the mains laid in said streets alleged in said bill, but as to these matters defendant has no information or knowledge upon which to base a relief and accordingly demands proof of the same.

Defendant admits that complainant has complied with and carried out the terms of said ordinance, contract and agreement as alleged, and that complainant had, prior to January 1st, 1893, placed, constructed and erected forty-four hydrants and has ever since maintained them for the use of the said defendant, the said defendant has possessed and used the same under and by virtue of said contract.

Defendant denies that under said ordinance and contract it became and was and now is the duty of defendants to pay complainant as rental for the said hydrants, the sum of $1,962.50 on the 1st day of January and July of each year after the making of said contract or ordinance.

Defendant denies that said sum of $1,962.50 is the just sum due under said contract, and it further and specifically denies that it was and is defendant's duty under said contract or ordinance to levy and collect a tax sufficient to meet said alleged semi-annual obligations of $1,962.50.

28 Defendant admits that it became and was the duty of its board of trustees to make, during the last quarter of each fiscal year, appropri-ons for the ensuing fiscal year as alleged in said bill.

And defendant further admits that prior to April 1st, 1895, the fiscal year of the town of Raton commenced on the 1st day of April in each year.

Defendant, however, denies that it became and was the duty of said trustees *the* include in said annual appropriation bill the amounts hereinbefore mentioned as the semi-annual payments for the rental and use of said hydrants.

Defendant admits the passage as alleged of ordinance numbered 59, marked as Complainant's Exhibit "E," but for greater certainty therein prays leave to refer to said ordinance when the same shall be produced.

Defendant further admits that its board of trustees did issue to complainant the several warrants of said town, drawn in manner, amount and number as alleged in said bill.

Defendant admits that it is the duty of the treasurer of said town to have and keep in his office a book called "The Registry of Town Orders." But the defendant denies that it was and is the duty of said town treasurer to enter and set down, at the date of the presentation thereof, each of said warrants, and to pay out of the funds of the said town, in his hands for disbursement, the amount of each of said warrants in the order in which the same were presented to him for payment, or in any other order. Said warrants being illegal, null and void.

29 Your defendant denies that it was the duty of the said town of Raton to collect the amount of all town licenses in lawful money and not otherwise and it further denies that it is its duty to apply said amounts if collected in cash to the payment of the warrants issued to complainant as aforesaid.

Defendant admits the enactment and passage on the date named of the ordinance numbered 64 and marked as Complain-t's Ex-

hibit "F" but for greater certainty therein prays leave to refer to said ordinance when the same shall be produced.

Defendant denies, however, that said ordinance was enacted wrongfully and without authority of law and on the contrary insists that the same is valid and in full force and effect. Defendant further denies that said ordinance numbered 64 was and is invalid, illegal and void by reason of being in conflict with the terms of said ordinance numbered 59, or any other ordinance.

Defendant admits that its board of trustees did on June 12th, 1895, enact and pass as alleged an ordinance numbered 65, marked as Complainant's Exhibit "G" but for greater certainty therein prays leave to refer to the same when it shall be produced. Defendant however denies that said mentioned ordinance is invalid, illegal and void as against complainant, or any other person or persons, but insists that said last-mentioned ordinance was and is valid and in full force and effect.

Defendant admits that warrants numbered 536 and 537, mentioned in complainant's bill, were presented as alleged for registra-
30 tion and that the same were refused registration by said town treasurer.

Defendant denies that it has at any time or place refused to perform its duty under the contract and ordinance referred to in complain-t's bill, but on the contrary, shows that it has performed and will perform its obligations toward complainant under said ordinance so far as the same is binding, valid and of force and effect.

Defendant admits that it has been and now is in the possession, use and enjoyment of the water plant of complainant as hereinbefore more fully set forth, but denies that on January 1st, 1895, there became due to complainant the amount alleged in its bill, or that on July 1, 1895, there became due the further sum of $1,962.50, or that there will become due to complainant on the 1st day of January and July of each year during the continuance of said contract, the like sum of $1,962.50.

Defendant admits that it has given out that said contract so far as it calls for the payment of $1,962.50 semi-annually, is inoperative and invalid and further admits that it has refused to pay said sum of $1,962.50 semi-annually, and for cause of such refusal defendant further answering shows to your honor as follows: That defendant is a municipal corporation, organized under the laws of the Territory of New Mexico as contained in sections 1608 *et seq.*, as amended of the compiled laws of said Territory.

That as such municipal corporation it granted to complainant a private incorporated company, the right to build, maintain
31 and operate water works as hereinafter admitted, and, as hereinbefore set forth, defendant contracted with complainant to furnish water as is fully set forth in Complainant's Exhibit No. A, hereinbefore referred to.

Defendant further shows that under the law it is authorized, empowered and required to levy each year and to cause to be collected a special tax sufficient to pay off the water rents agreed to be paid to complainant, *provided* the said special tax shall not exceed the

sum of two mills on the dollar for any one year. Defendant shows that as practically its entire revenue is derived from its tax levy, it is thus limited in its payment for water rents to the proceeds of a two-mills tax levy on each dollar of taxable property.

Defendant further shows that for the year 1891 the total assessment for town purposes, as certified by the county assessor, was $628,940, that the town tax rate for said year was five mills on the dollar, making the total possible tax yield $3,119.70 and giving an actual tax yield of $2,089.52, for the year 1892, the total assessment was $673,900, the tax rate eight mills on the dollar, and the actual amount of taxes collected $3,204.39. For the year 1893, the total assessment was $807,230; the tax rate was six mills, and the taxes actually collected amount to $2,718.83. For the year 1894 the total assessment was $650,620, the tax rate was ten mills on each dollar of taxable property and the amount of taxes actually collected was $3,616.52. Defendant shows that under the law it paid complainant each year the full proceeds of the two-mills
32 tax levy authorized by law for water rents; that in 1892 it paid complainants the sum of $1,925; in 1893 the sum of $1,800; in 1894, the sum of $1,600; and for 1895 it has, under ordinance numbered "F" hereinbefore referred to, levied said special tax of two mills on each dollar of taxable property to meet complainant's water rent. Defendant shows that under the law the total amount appropriated for any purpose for any fiscal year cannot exceed the probable amount of revenue for that year, and that its appropriation of $1,500, in said ordinance number "F" for complainant's benefit for the year 1895 is a full compliance with complainant's legal demands under said contract, marked Complainant's Exhibit "A" as likewise amounts paid for 1892, 1893 & 1894 are in full of all that complainant can in equity and good conscience demand under its contract with defendant. Your defendant further answering shows that said alleged semi-annual rental of $1,962.50 claimed by complainant is far in excess of the amount derivable from a two-mill tax levy on the assessed value of property subject to taxation within said town of Raton, and that said rental so far as it is in excess of the proceeds of such a tax levy, is illegal, inoperative and void.

Defendant further shows that said ordinance marked Exhibit "A" so far as the same imposes upon the defendant, the obligation to pay complainant an annual sum greater than the proceeds of a two-mill tax levy, or to impose a tax levy greater than said rate
was and is null, void and inoperative, the same having been
33 made and entered into by defendant's trustees in violation of law and in excess of the powers confered upon them by the statutes of New Mexico.

Defendant further shows that said warrants issued to complainant, as set forth in complainant's bill, were and are null and void having been issued by defendant's trustees in excess of the amount derived from a two-mills levy on each dollar of taxable property thus and having thus been issued contrary to law and in excess of the authority conferred by law upon said trustees.

Defendant further shows that the reasons just mentioned, ordinance No. 59, referred to by complaina-t as Exhibit "E" was and is void and inoperative, and that ordinance No. 64 referred to by complainant as Exhibit "F" was and is valid and in full force.

Defendant further answering denies that by reason of the facts aforesaid, complainant will sustain great and irreparable injury, or that it will be necessary for complainant to institute a multiplicity of suits as alleged in said bill of complaint.

And this defendant submits to this honorable court that all and every the matter in the complainant's bill mentioned and complained of, are matters which may be tried and determined at law and with respect to which the complainant is not entitled to any relief from a court of equity, and this defendant asks that *he* shall have the same benefit of this defense as if *he* had demurred to ths complainant's bill.

And this defendant further answering, denies that the
34 complainant is entitled to the relief or any part thereof, in the said bill of complaint demanded, and prays the same advantage of this answer as if *he* had pleaded or demurred to said bill of complaint, and prays to be dismissed with *his* reasonable costs and charges in this behalf, most wrongfully sustained.

J. H. CRIST,
A. J. MITCHELL,
Att'ys for Respondent.

And afterwards, to wit: on the 2nd day of October, 1896, there was filed in said clerk's office a decree which said decree is in words and figures as follows, to-wit:

TERRITORY OF NEW MEXICO, }
County of Colfax. }

In the District Court, Fourth Judicial Circuit.

RATON WATER WORKS CO. }
vs. } No. 1888. Specific Performance.
TOWN OF RATON. }

This cause having heretofore been set down for hearing upon the bill of complaint of the said complainant, and the answer of the said defendant, in pursuance of the stipulation of the parties hereto and the said cause now coming on for hearing upon the said bill and answer, and the court being now fully informed and advised in the premises, doth find that the said defendant, The Town of Raton, *defendant*, at the time of the filing of said bill was and now is a municipal corporation organized and existing under and in pursuance of the laws of this Territory, and that the
35 said defendant corporation did heretofore, to wit, on July 24th, 1891, under and in pursuance of the laws of said Territory make and enter into a certain contract and agreement with the said complainant, The Raton Water Works Company, a corporation organized and existing under and by virtue of the laws of this Ter-

ritory, the terms and conditions whereof were and are set forth and embodied in a certain public ordinance of the said town duly enacted and passed by the board of trustees thereof, the same being ordinance No. 10, being entitled, "Ordinance No. 10, granting franchise to Raton Water Works Co., to erect and maintain water works," published July 31st, 1891, and which said ordinance, contract and agreement was and is in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, }
County of San Miguel. }

I, Felix Martinez, clerk of the fourth judicial district court of the Territory of New Mexico, *ex officio* clerk of the district court, sitting within and for the county of Colfax, do hereby certify that the above and foregoing, to which this certificate is attached, contains a true and correct copy of the bill of complaint, answer and final decree in the case wherein The Raton Water Works Company is complainant and The Town of Raton is defendant as the same remains on file in my office.

Witness my hand and the seal of said court this 30th day of January, A. D. 1897.

[SEAL.] FELIX MARTINEZ, *Clerk.*

36 TERRITORY OF NEW MEXICO, }
County of Colfax. }

In the District Court, Fourth Judicial District.

RATON WATER WORKS CO. }
vs. } No. 1888. Specific Performance.
TOWN OF RATON. }

This cause having been heretofore set down for hearing upon the bill of complaint of the said complainant and the answer of the said defendant in pursuance of the stipulation of the parties hereto, and the said cause now coming on for hearing upon the said bill and answer, and the court being now fully informed and advised in the premises, doth find that the said defendant, The Town of Raton, *defendant*, at the time of the filing of said bill was and now is a municipal corporation, organized and existing under and in pursuance of the laws of this Territory, and that the said defendant corporation did heretofore, to wit: on July 24th, 1891, under and in pursuance of the laws of said Territory, make and enter into a certain contract and agreement with
37 the said complainant, The Raton Water Works Company, a corporation organized and existing under and by virtue of the laws of this Territory, the terms and conditions whereof were and are set forth and embodied in a certain public ordinance of the said town, duly enacted and passed by the board of trustees thereof, the same being ordinance No. 10 of the said town, entitled "Ordinance No. 10, granting franchise to Raton Water Works Company

to erect and maintain water works," published July 31st, 1891, and which said ordinance, contract and agreement was and is in words and figures as follows, to wit:

Whereas, the Raton Water Works Company, a corporation created and existing under and by virtue of the incorporation laws of the Territory of New Mexico, has presented the board of trustees of the town of Raton a proposition for the construction of a system of water works, to be fully completed by July 1st, 1892, and

Whereas, the health, comfort and general welfare of the citizens of this town demand that we take prompt and efficient measures to secure an ample supply of water, especially in view of the fact that the present requirements of the railroad company are barely sufficient for its own purposes. Therefore,

Be it ordained by the board of trustees of the town of Raton:

SECTION 1. That the exclusive right of way and right and privilege to construct, operate and maintain water works in and
38 near the town of Raton, New Mexico, for the purpose of supplying said town and the citizens thereof with good and wholesome water for domestic, manufacturing and sanitary purposes, as well as for the better protection of the property of the town from disasters by fires, is hereby granted to the Raton Water Works Company, a corporation duly organized and existing under and by virtue of the general incorporation laws of the Territory of New Mexico, its successors and assigns for a term of twenty-five years from the 15th day of July, A. D. 1891.

SEC. 2. And the said Raton Water Works Company, or its successors or assigns, are hereby granted the exclusive right of way, as held by said town for the period of twenty-five years from July 15th, 1891, to lay water pipes in any and all streets, alleys, lanes, roads and other highways and grounds dedicated or controlled, or which may be hereafter dedicated or controlled within the boundaries of the present or future corporate limits of the town, and to extend said pipes, and to place, construct and erect hydrants, fountains, conduits, and such useful devices or structures as may be necessary for the successful operation of the said water works system and the proper distribution of water in the town, and for this purpose said water company shall have the right to excavate streets, alleys, lanes, roads, pavements and sidewalks and other public grounds; *Provided* that there shall be no unreasonable obstruction of the streets or any public highway, and after the use of said streets and
39 highways for the above purposes, they shall be restored as near as practicable to the same condition as the said company found the same on entering thereon.

SEC. 3. Said Raton Water Works Company shall lay main pipes along and through the streets of said town as the board of trustees may order, substantially as follows:

From Apache avenue along Railroad avenue to Savage avenue.
From Apache avenue along Santa Fe avenue to Moulton avenue.
From Galisteo avenue along Topeka avenue to Moulton avenue.
From Mora avenue along Atchison avenue to Moulton avenue.
From Mora avenue along Tunnel avenue to Miembres avenue.

From Apache avenue along Raton avenue to Miembres avenue. Also one main pipe for the accommodation of the people living in that portion of the town east of Railroad avenue.

And the board of trustees shall locate the twenty-five hydrants hereinafter provided for, along the mains aforesaid, taking into consideration those already located, and shall notify said water company before said mains are laid, the places where such hydrants shall be erected.

SEC. 4. Said Raton Water Works Company, its successors or assigns, shall lay and extend pipes for carrying said water to any part of the aforesaid town when requested so to do by the board of trustees; *Provided*, persons owning property along the line of
40 such proposed extensions shall take a reasonable amount of water, and *provided also*, there shall be ordered set in each street or lane by said trustees, on which said company or its assigns shall be required to lay pipe, one hydrant for every eight hundred feet of main pipe so laid or extension ordered. It is understood, however, that no hydrants will be paid for by the town upon any of the extensions of the pipe not ordered by the trustees.

SEC. 5. The said company shall either construct a gravity line or use such engines and pumps as shall be capable in either case, of furnishing one million of gallons of water every twenty-four hours, and when needed, with a fire pressure of eighty pounds to the square inch on Fourth street in said town. All main pipes shall be of the best quality of cast or wrought iron or lead, such as is commonly used for that purpose, and all of said pipes to bear a 150-pounds hydraulic pressure to the square inch. And the said water company shall have the said works completed so as to furnish water to the town by July 1st, 1892. The said company shall commence the work of construction within sixty days from the date of the acceptance of this franchise by said company, and shall prosecute the said work as speedily as possible. In case said company shall fail to commence and continuously prosecute work as aforesaid, then this franchise shall become null and void and of no force and effect; *provided, however*, that if any injunction or other process of any court shall be instituted against said company restraining them from prosecuting said work, the time consumed by
41 said injunction or other process, shall not be computed in the sixty days aforesaid.

SEC. 6. If pumps are used, the said water company hereby agrees to construct a receiving reservoir of sufficient capacity to hold at least three million gallons of water, with a wall through the center thereof which will admit of one-half of said reservoir to be drained and cleaned when necessary, while the other can furnish the necessary water supply. Said reservoir to be executed to a depth of not less than six feet, with walls and bottom of stone and hydraulic cement, so as to be absolutely water-tight. And in case a gravity line is used, a storage reservoir shall be constructed of sufficient capacity to hold at least ten million gallons of water.

SEC. 7. Said town shall have, after the expiration of five years, the right to purchase the water works with all its right, properties

and franchises at a fair valuation, which shall be determined by three disinterested persons, non-residents of the town. One of said persons to be chosen by the board of trustees, one by the water company, one by the two thus selected. When this valuation shall be made as herein provided, the town shall pay the said valuation with ten per cent. added.

SEC. 8. The town authorities shall and will adopt and enforce all needful and requisite ordinances necessary to protect the water works and the owners thereof from fraud and imposition, and to prevent the unnecessary waste of water on the part of consumers, and the water works company shall have the power to make
42 such rules and regulations for the conduct and management of its business not inconsistent with existing law and as they may deem necessary.

SEC. 9. The said town hereby exempts from all taxes for a term of twenty-five years, from and after the date specified in section 1, the property of said water works company of every name, nature and description which may be used by it in the conduct of its business.

SEC. 10. In consideration of the benefits that will accure to the town of Raton and its people, by the erection and operation of water works, and for the better protection of the town against fires, the town of Raton does hereby agree and bind the said town to rent from the said Raton Water Works Company or its assigns, for the aforesaid term of twenty-five years, twenty-five hydrants for the purpose of extinguishing fires and purposes pertaining to the fire department, flushing sewers, and irrigating public school grounds and parks, and the said town by the said board of trustees hereby agrees and binds the said town to pay to the said Raton Water Works Company or its assigns, at the rate of one hundred dollars per year for each of said twenty-five hydrants. That the said board of trustees further agree and bind the said town of Raton to pay said Raton Water Works Company or its assigns, the sum of seventy-five dollars per year for each hydrant for the next twenty-five additional hydrants that may be ordered set and erected by said board of trustees, and fifty dollars per year for each subsequent
43 hydrant ordered set and erected thereafter by said board of trustees; *Provided*, the said Raton Water Works Company, or its assigns, shall erect and maintain, at all times, in good repair, double-discharge fire-hydrants with four-inch connections to the main pipe and two and one-half inch hose connections with each hydrant.

SEC. 11. That the said town of Raton shall pay to the said Raton Water Works Company or its assigns, as follows, to wit: on the first day of January and July of each and every year one half of the aforesaid money and for all additional hydrants thereafter in like manner on the 1st day of January and July as aforesaid. The said town agrees to levy and collect a tax sufficient for the purpose of making said semi-annual payments for each and every one of the twenty-five years aforesaid, and in default of making said pay-

ment the said town shall pay interest on said semi-annual payments at the rate of ten per cent. per annum.

SEC. 12. In the event of the shortage of water, either by reason of drouth, accidents, or other causes over which said water company can have no control, the water shall be first supplied to the citizens for domestic use and to the railroad company for its purposes; *Provided, however*, that if said company shall neglect or fail for any reason within its control, to furnish a supply of wholesome water as herein provided, the trustees shall have power to force said company to do so by fines not less than three hundred nor more than one thousand dollars for the first offence, and if
44 such failure shall continue for a period of thirty days, said board of trustees shall have power to revoke this franchise.

SEC. 13. For the government of the water works company and for the protection and government of the citizens, the water rates to consumers during the continuance of this franchise shall not exceed the following monthly tariff rates, namely:

	Per month.
Barber shop, first chair	$1.50
Each additional chair	.75
General stores, dry goods, groceries, etc	2.00
Private bath-tubs, each	.75
Hotel or boarding-house bath-tub	1.50
Public bath-tubs, each	2.50
Boarding-houses, for each room	.30
Cows, each	.25
Drug stores	3.50
Forges, each	1.25
Horse, private	.50
Horses, livery stable, for each stall	.40
Horse, other than above	.40
Hotel, each room	.50
Offices and banks	1.50
Photograph gallery	2.00
Residences, four rooms or less	1.50
Additional rooms	.25
Public lodging-houses, each room	.40
Restaurants, all night	10.00
Restaurants, 16 hours	6.00
Saloon, all night	6.00
Saloon, 16 hours	5.00
School, for each 25 scholars	1.50
Plastering, per 100 yds	.60
45 Brick-work, per 1,000 laid	.15
Urinal basins, each	1.50
Water-closet, private house	.75
Water-closet, hotel	1.50

For irrigating lawns, gardens and lots, 25 cents per annum per front foot.

For uses not otherwise specified, special rates may be made by

said water company and collected. The company shall have the right to place a meter in the pipe of any customer and charge the tariff price hereinafter named, and the customer shall have the right to demand and receive such meter and pay according to said meter measurement, as follows:

200 gallons	per	day	or	less	.....	...	5c.	per	100	gallons.
200 to 1,000	gallons	per	day	or	less	.....	4½c.	"	"	"
1,000 to 2,000	"	"	"	"	"	.....	4c.	"	"	"
2,000 to 4,000	"	"	"	"	"	.....	3½c.	"	"	"
4,000 to 6,000	"	"	"	and	upwards	..	3c.	"	"	"

In case either party shall elect that meters shall be set, the same shall be paid for by the party commanding the same.

SEC. 14. It shall be unlawful for any person except such as are authorized by said water company, or by the mayor or board of trustees of said town, with the approval of said water company, to in any manner disturb or meddle with any main, hydrant, connection, service pipe, fountain, reservoir, well, building, machinery or any other property of or belonging to said company or the town of Raton, or by any means pollute or defile any reservoir, well, spring, source of water supply, or any hydrant, fountain or receptacle receiving said water from said water works. Any person violating any of the provisions of this section, shall, on conviction before any justice of the peace resident of said town, be punished by a fine of not less than ten dollars nor more than two hundred dollars, or imprisonment in the county jail or town prison for a period of not less than thirty days or more than three months, or both said fine and imprisonment in the discretion of the court.

SEC. 15. Within thirty days after the granting of this franchise, the said Raton Water Works Company shall file with the town recorder of said town, its acceptance in writing, of all the terms, provisions and conditions of this ordinance, which acceptance, before filing, shall be duly acknowledged before some officer authorized to take acknowledgments, and the same shall be recorded in the book of ordinances of said town, and safely kept by the said town recorder; *Provided*, the same shall be ratified by a vote of the people of this town as is hereinafter provided.

SEC. 16. An election for the ratification or rejection of this ordinance shall be held in the town of Raton, at the hose-house on the 1st day of August, A. D. 1891, and the following-named persons shall act as judges and clerks of said election: Ray Harvey, C. D. Stevens, Francisco Salazar, judges. Antonio Pinzon and W. D. Pemberton, clerks.

The ballot shall be in the form prescribed by statute, and said ballots shall read:

"For water-works ordinance as passed by town trustees July 20, 1891."

47 "Against water-works ordinance as passed by town trustees July 20, 1891."

WM. TINDALL, *Mayor.*

CHAS. A. FOX, *Recorder.*

Published July 24, 1891.

And the court doth further find, that the said ordinance, contract and agreement was duly ratified and confirmed at an election held in the said town of Raton on the 1st day of August, 1891, by a vote of the duly qualified electors of said town in pursuance of the requirements of law in relation thereto, and that the said ordinance, contract and agreement became and was and now is valid and operative and in full force and effect.

And the court doth further find that within thirty days thereafter said complainant did file with the town recorder of the said town of Raton its acceptance in writing of all the terms, provisions and conditions of the said ordinance, which said acceptance was duly acknowledged by said defendant corporation, and that all the requirements of law and of said ordinance, contract and agreement were fully and duly complied with by the said complainant corporation, and that the said ordinance, contract and agreement became and was and now is in all respects valid and obligatory upon both of said parties thereto.

And the court doth further find that in and by the said contract and agreement, so embodied in the said ordinance, it was contracted and agreed that the said complainant corporation should

48 lay main pipes along and through the streets of said town as the board of trustees thereof might order, substantially as follows:

From Apache avenue along Railroad avenue to Savage avenue.
From Apache avenue along Santa Fe avenue to Moulton avenue.
From Galisteo avenue along Topeka avenue to Moulton avenue.
From Mora avenue along Atchison avenue to Moulton avenue.
From Mora avenue along Tunnel avenue to Miembres avenue.
From Apache avenue along Raton avenue to Miembres avenue.

Also one main pipe for the accommodation of the people living in that portion of the town east of Railroad avenue.

And the board of trustees shall locate the twenty-five hydrants hereinafter provided for, along the mains aforesaid, taking into consideration those already located, and shall notify said water company before said mains are laid, — the places where such hydrants shall be erected.

And it was thereby further provided that: "Section 4, said Raton Water Works Company, its successors or assigns, shall lay and extend pipes for carrying said water to any part of the aforesaid town when requested so to do by the board of trustees: *Provided* persons owning property along the line of such proposed extensions shall take a reasonable amount of water, and provided also that there shall be ordered set in each street or lane by said trustees, on

49 which said company or its assigns, shall be required to lay pipe, one hydrant for every (800) eight hundred feet of main

pipe so laid or extension ordered. It is understood, however, that no hydrant will be paid for by the town upon any of the extensions of the pipes not ordered by the trustees."

And the court doth further find that in and by said ordinance, contract and agreement it was further contracted and agreed, that in consideration of the benefits that would accrue to the said town of Raton and its people, by the erection and operation of said water works, and for the better protection of the said town against fires, the said town of Raton did thereby agree and bind the said town to rent from the said Raton Water Works Company or its assigns, for the term of twenty-five years thereafter, twenty-five hydrants for the purpose of extinguishing fires, and for purposes pertaining to the fire department of said town, flushing sewers and irrigating public school grounds and parks, and the said town by the board of trustees thereof did thereby agree and bind the said town to pay to the complainant or its assigns at the rate of one hundred dollars per year for each of said twenty-five hydrants.

And the said town did thereby further contract and agree to pay to the complainant or its assigns the sum of seventy-five dollars per year for each hydrant for the next twenty-five additional hydrants that might be ordered set and erected by the board of trustees of said town, and fifty dollars per year for each subsequent hydrant ordered set and erected thereafter by said board of trustees.

50 And it was further thereby provided that the complainant should erect and maintain at all times, in good repair, double-discharge fire-hydrants, with four-inch connections to the main pipe and two and one-half inch hose connections with each hydrant.

And the court doth further find that in and by said ordinance, contract and agreement it was further contracted and agreed that said defendant corporation should and would pay to the said complainant as follows, to wit:

On the first day of January and July of each and every year one-half of the amount of said rental for said hydrants so as aforesaid erected and maintained by the said complainant at the annual rental therefor hereinbefore mentioned, and at the said rates and periods for all such additional hydrants as might thereafter be erected and maintained by the said complainant under and in pursuance of said ordinance, contract and agreement.

And the court doth further find, that the said complainant company has in all respects fully performed and complied with all the terms and conditions of said ordinance, contract and agreement upon its part, and that after the making of the same, the said complainant company did lay mains in and upon the following streets as provided for in and by said ordinance, contract and agreement, to wit:

From Apache avenue along Railroad avenue to Savage avenue.

From Apache avenue along Santa Fe avenue to Moulton avenue.

51 From Galisteo avenue along Topeka avenue to Moulton avenue.

From Mora avenue along Atchison avenue to Moulton avenue.

From Mora avenue along Tunnel avenue to Miembres avenue, and

From Apache avenue along Raton avenue to Miembres avenue.

Also a main pipe along the principal street on the east side of the railroad in said town.

And the court doth further find that on the 9th day of May, 1892, the board of trustees of said town did issue an order under the terms and conditions of said ordinance and contract, and did thereby order and contract that fire hydrants or plugs should be set by said complainant company in addition to the fire hydrants or plugs theretofore set, on the southeast corner of the following blocks in the Maxwell north addition to said town, to wit:

Blocks 1, 2, 3, 4, 5, 6, 7, 10, 11 and 13, and of the following blocks in the town-site addition to said town, to wit:

Blocks 1, 2, 3, 4, 8, 7, 6, 5, 44, 9, 10, 11, 12, 13, 18, 17, 16, 15, 14, 21, 22, 25, 24, 32 and 33, and on the following blocks in the Maxwell west addition to said town, to wit: Blocks "N" and No. 1.

And the court doth further find that on the 20th day of June, 1892, the said defendant corporation, by the board of trustees thereof, did order and contract with said complainant to extend the first street or Railroad Avenue main to Rio Grande avenue, and the second street or Santa Fe Avenue main to the middle of
52 block No. 30, and that a fire-hydrant should be set at the southeast corner of block 27.

And the court doth further find, that all of the said orders and directions so made by said defendant corporation were fully complied with and performed by the said complainant company.

And the court doth further find, that in pursuance of the conditions of said ordinance, contract and agreement, 1,300 feet of water main were laid by said complainant company in said street, in that portion of the said town of Raton lying east of the Atchison, Topeka & Santa Fe railroad, in said town, on which there were set up by said complainant two hydrants, and there were set in all 44 hydrants by the said complainant under and in pursuance of the said ordinance and contract.

And the court doth further find, that the board of trustees of the said defendant Town of Raton, did appoint a committee to investigate the plant of said complainant and that said committee did, on October 15, 1892, make a written report to the said board of trustees, that the said plant had been constructed practically in accordance with the said ordinance and contract, and did recommend that the same should be accepted by the said defendant corporation under the conditions of the said ordinance and contract, and that the said water works, mains, pipes, fire-plugs, hydrants and plant, so constructed and laid by the said complainant company were duly accepted by the said defendant Town of Raton.

And the court doth further find that the said complainant
53 company did construct the said water works and plant within the time and in accordance with the terms of the said ordinance, contract and agreement, at a large expenditure of money, to wit: $115,000, and that the said complainant company did con-

struct a reservoir with a capacity of 42,000,000 gallons of water, and did lay and construct six and seven-tenths miles of water mains of eight-inch capacity into said town of Raton, in addition to the said mains laid in said streets, and did have the same completed and in operation in supplying water to said defendant Town of Raton, and its inhabitants within the time prescribed by the said ordinance, contract and agreement, and has in all things strictly performed, complied with and carried out the terms of the said ordinance and agreement, and did, prior to January 1st, 1893, place, construct and erect 44 hydrants and has ever since maintained the same for the use of the said defendant, The Town of Raton, and that the said defendant town has ever since said last-mentioned date been and now is in possession, occupancy and use of the same under and by virtue of said ordinance and contract.

And the court doth further find, that prior to the first day of April, 1895, the fiscal year of said defendant town commenced on the first day of April in each year in pursuance of law, and that it was the duty of a board of trustees of said town, within the last quarter of each fiscal year to pass an ordinance to be termed "Annual appropriation bill," for the next ensuing fiscal year, and thereby to appropriate such sum or sums of money as was necessary
54 to defray the expenses and liabilities of said defendant town, and to include therein the amount necessary to make the said semi-annual*ly* payments to the said complainant company for the rental and use of said hydrants in pursuance of said ordinance and contract.

And the court doth further find, that in pursuance of said duty so imposed by law, the board of trustees of said defendant Town of Raton, did, on, to wit, March 18, 1895, and within the last quarter of said fiscal year enact and pass an ordinance entitled "An ordinance relating to tax levy and appropriations for the years 1895 and 1896," and did thereby appropriate out of the moneys and revenues covered into the treasury of the said defendant town, or to be collected and paid into the same from any and all sources, during the fiscal year commencing on the 1st day of April, 1895, derived from taxes, licenses, fines, fees and all other sources, the sum of $4,735.15 for the payment of the amount then due and payable to the said complainant under and by virtue of the said ordinance and contract, and did thereby further appropriate the sum of $3,925, for the payment of said complainant for hydrants so set and provided by said complainant, as aforesaid, for the year commencing January 1st, 1895, to wit, $4,735.15, and that the board of trustees of said defendant town did issue to said complainant warrants of said town as follows, to wit: Warrant No. 536, dated January 1st, 1895, due six months after date, for the sum of $609.37; warrant No.
537, dated January 1st, 1895, due six months after date, for the
55 sum of $500; warrant No. 538, dated January 1st, 1895, due October 1st, 1895, for the sum of $609 38; warrant No. 539, dated January 1st, 1895, due October 1st, 1895, for the sum of $500; warrant No. 540, dated January 1st, 1895, due January 1st, 1896, for the sum of $609.37; warrant No. 541, dated January 1st, 1895, due

January 1st, 1896, for the sum of $500; warrant No. 542, dated January 1st, 1895, due April 1st, 1896, for the sum of $609.38; warrant No. 543, dated January 1st, 1895, due April 1st, 1896, for the sum of $500; all of said warrants bearing interest at the rate of ten per cent. from date; warrant No. 544, dated March 18th, 1895, payable on demand, for the sum of $297.65, for the interest due on account up to January 1st, 1895. Each of which said warrants was duly drawn on the treasurer of the town of Raton, signed by the mayor and countersigned by the recorder of said town.

And the court doth further find, that in pursuance of law it was the duty of the treasurer of the said town to have and keep in his office a book to be called "The Registry of Town Orders," wherein should be entered and set down, at the date of the presentation thereof, each of said warrants, and to pay out of the funds of said town in his hands for disbursement, the amount of each of said warrants, in order in which the same were presented to him for payment.

And the court doth further find that, although so requested so to do, the defendant, prior to the commencement of this suit, had refused and still refuses to perform the said agreement upon
56 its part, and to pay to said complainant the said semi-annual rental for the hydrants so set and provided by said complainant company, at the said periods when the same became due, and as the same would hereafter accrue, in pursuance of said ordinance and contract and that said complainant has fully performed its said agreement upon its part, and the said defendant has been and now is in the possession, use and enjoyment of the said water plant, under said contract.

And the court doth further find, that in addition to the amount of said rental, payable to the said complainant on and prior to January 1st, 1895, as hereinbefore stated, there became due to the complainant company the sum of $1,962.50, and the court doth further find, that the said defendant has refused and still refuses to pay the said amount heretofore accrued and payable to the said complainant company, and has refused and still refuses to pay the said several amounts which have heretofore accrued and which will hereafter accrue to the said complainant.

And the court doth further find that all the material allegations in the said bill of complaint, of said complainant herein, are true as therein stated.

And the court being of opinion that the said complainant, Raton Water Works Company, is entitled to the specific performance of the said ordinance, contract and agreement on the part of the said defendant Town of Raton, in accordance with the prayer of the said bill of complaint—

It is ordered, adjudged and decreed by the court here that the said ordinance, contract and agreement be in all things spe-
57 cifically performed by and on the part of the said defendant Town of Raton, and that said defendant issue to the said complainant the warrants of the said town of Raton in proper form and payable out of any funds or moneys in the treasury of the said

town of Raton, derived from any levy of taxes, either general or special, or from licenses, by said town of Raton, in payment and satisfaction of the amounts of said rental of said hydrants, which have heretofore accrued and become payable, in pursuance of the terms of the said ordinance, contract, and agreement, entitled "Ordinance No. 10, granting franchise to Raton Water Works Company to erect and maintain water works," published July 24, 1891, and hereinbefore found by this court to have heretofore become payable at the said several dates and periods herein mentioned, or which shall hereafter become payable, at the respective dates and periods specified in said ordinance and contract, and

It is further ordered that either of the said parties herein shall be at liberty to apply to this court for further directions or relief in the premises, if occasion shall require.

——— ———,

Chief Justice of the Supreme Court of the Territory of New Mexico and Judge of the Fourth Judicial District Court Thereof, within and for the County of Colfax.

Dated this — September, 1896.

58 And afterwards, to wit, there was filed in the office of the clerk of the said Supreme Court, on February 1st, 1897, an assignment of errors, which said assignment of errors is in the words and figures following, to wit:

Assignment of Errors.

First. That the court below erred in holding that ordinance No. 10 of the town of Raton "granting franchise to Raton Water Works Company to erect and maintain water works," published July 24, 1891, and alleged to have been duly ratified and confirmed at an election held in the said town of Raton on the first day of August, 1891, became and was and now is valid and operative and in full force and effect, and in all respects obligatory upon the town of Raton.

Second. That the court erred in finding all the material allegations in the said bill of complaint to be true as therein stated.

Third. That the court erred in decreeing a specific performance of said ordinance No. 10 by and on the part of the town of Raton.

Fourth. That the court erred in decreeing that the town of Raton is by reason, of said ordinance No. 10, indebted to the said Raton Water Works Company in the sums mentioned in said decree or in any amount whatsoever, and in decreeing that said town of Raton issue to the said Raton Water Works Company, its warrants in payment and satisfaction of the amounts thus found to be due under said ordinance No. 10.

59 And afterwards, to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, New Mexico, the seat of government of said Territory, on

the last Monday of July, 1896, the same being Monday, July 27th, A. D. 1896, and on the 46th day of said term of said supreme court, the same being Monday, February 1st, A. D. 1897, the following, among other, proceedings were had, to wit:

RATON WATER WORKS COMPANY, Appellee,
vs.
TOWN OF RATON, Appellant.
} Appeal from Colfax County. 705.

By agreement of the said parties, by their respective attorneys, H. L. Warren, Esq., appearing for said appellee, and Jacob H. Crist, Esq., appearing for said appellant, this cause is now submitted to the court without argument upon the transcript of record, assignment of errors, and briefs of counsel on file, and the court, not being sufficiently advised in the premises, takes the same under advisement.

60 And afterwards, to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, New Mexico, the seat of government of said Territory, on the last Monday in July, 1897, the same being Monday, July 26th, 1897, and on the eleventh day of said regular term of said supreme court, the same being Friday, August 6th, 1897, the following, among other, proceedings were had, to wit:

RATON WATER WORKS COMPANY, Appellees,
vs.
THE TOWN OF RATON, Appellant.
} Appeal from Colfax County. 705.

This cause having been submitted to the court at a former term of this court and taken under advisement by the court, the court, being now sufficiently advised in the premises, announces its decision by Associate Justice Laughlin, Associate Justices Collier, Hamilton, and Bantz concurring, for reasons stated in the opinion of the court on file, reversing this cause with directions to the lower court to dismiss the bill of complaint at the cost of the complainant.

It is therefore considered, adjudged, and decreed by the court
61 that this cause be, and the same hereby is, reversed, and the district court for the county of Colfax, whence this cause came into this court, is hereby directed to dismiss the bill of complaint at the cost of complainant. It is further considered and adjudged by the court that the said appellant, The Town of Raton, do have and recover of the said appellees, The Raton Water Works Company, its costs in this behalf expended in the court below as well as in this court, to be taxed, for which let execution issue.

And afterwards, to wit, on August 6th, 1897, at said regular term of the said supreme court, there was filed in the office of the court of the said supreme court an opinion; which said opinion is in the words and figures following, to wit:

62 In the Supreme Court of the Territory of New Mexico, July Term, 1896.

RATON WATER WORKS COMPANY, Appellee,
versus
THE TOWN OF RATON, Appellant.

This cause was brought to this court on appeal from a final decree against appellant rendered in the district court of Colfax county, Hon. Thomas Smith, chief justice, presiding.

Statement.

The complainant corporation, The Raton Water Works Company, filed its bill of complaint in the court below against the defendant corporation, The Town of Raton, and among the allegations it alleged that it entered into a certain contract with the said defendant corporation by which it agreed and bound itself, its successors and assigns, to supply the said defendant corporation with water for a period of twenty-five years from the 24th day of July, 1891. This contract was an exclusive grant to complainant corporation by the defendant corporation and was in the nature of an ordinance adopted and approved by the board of trustees of said defendant corporation and was and is known in the record in the cause as ordinance No. 10, and such parts thereof as seem material to the decision of the cause are as follows, to wit:

"SEC. 4. Said Raton Water Works Company, its successors or assigns, shall lay and extend pipes for carrying said water to any part of the aforesaid town when requested so to do by the board of trustees; Provided, persons owning property along the line of such proposed extensions shall take a reasonable amount of water, and provided also, there shall be ordered set in each street or lane by said trustees, on which said company or its assigns shall be required to lay pipe, one hydrant for every eight hundred feet of main pipe so laid or extension ordered."

63 "SEC. 9. The said town hereby exempts from all taxes for a term of twenty-five years, from and after the date specified in section 1, July 15th, 1891, the property of said water works company of every name, nature and description which may be used by it in the conduct of its business." * * *

"SEC. 10. In consideration of the benefits that will accru- to the town of Raton and its people, by the erection and operation of water works, and for the better protection of the town against fires, the town of Raton does hereby agree and bind the said town to rent from the said Raton Water Works Company or its assigns, for the aforesaid term of twenty-five years, twenty-five hydrants for the purpose of extinguishing fires and purposes pertaining to the fire department, flushing sewers and irrigating public-school grounds and parks, and the said town by the said board of trustees hereby agrees and binds the said town to pay to the said Raton Water Works Company or its assigns, at the rate of one hundred dollars

per year for each of said twenty-five hydrants. That the said board of trustees further agree and bind the said town of Raton to pay said Raton Water Works Company of its assigns, the sum of seventy-five dollars per year for each hydrant for the next twenty-five additional hydrants that may be orded set and erected by said board of trustees, and fifty dollars per year for each subsequent hydrant ordered set and erected thereafter by said board of trustees; Provided, the Raton Water Works Company, or its assigns, shall erect and maintain at all times in good repair, double-discharge fire-hydrants with four-inch connections to the main pipe, and two and one-half inch hose connections with each hydrant."

"SEC. 11. The said town of Raton shall pay to the said Raton Water Works Company or its assigns, as follows, to wit: On the first day of January and July of each and every year, one-half of the aforesaid money and for all additional hydrants thereafter in like manner on the 1st day of January and July as aforesaid.

64 The said town agrees to levy and collect a tax sufficient for the purpose of making said semi-annual payments for each and every one of the twenty-five years aforesaid, and in default of making said payment, the said town shall pay interest on said semi-annual payments at the rate of ten per cent. per annum."

"SEC. 15. Within thirty days after granting of this franchise, the said Raton Water Works Company shall file with the town recorder of said town, its acceptance in writing, of all the terms, provisions and conditions of this ordinance, which acceptance, before filing, shall be duly acknowledge- before some officer authorized to take acknowledgments, and the same shall be recorded in the book of ordinances of said town, and safely kept by the said town recorder; Provided, the same shall be ratified by a vote of the people of this town as is hereinafter provided."

"SEC. 16. An election for the ratification or rejection of this ordinance shall be held in the town of Raton, at the hose-house on the first day of August, A. D. 1891." * * *

The foregoing ordinance was ratified by the qualified electors of the defendant corporation as therein provided, and the contract was duly accepted by the complainant corporation as therein provided.

It appears in the record from the said bill of complaint that, at the request of the board of trustees of defendant corporation, complainant put in forty-four hydrants in the manner specified, the semi-annual rentals of which amounted to $1,962.50. It further appears that defendant corporation paid at that rate semi-annually to complainant corporation its water rents in money, and by its warrants, duly issued, for any balance due and for accrued interest, in accordance with said contract and ordinance No. 10, up to the year 1895; that on May 23rd, 1895, the defendant corporation enacted ordinance No. 64, under which it declined to pay more than the revenues derived from a two-mills levy on the dollar each year on all the taxable property within said defendant corporation.

Complainant prays for a specific performance of the con-

65 tract under ordinance No. 10 and for an order perpetually restraining defendant corporation from enforcing ordinance No. 64.

The defendant corporation in its answer admits that complainant corporation complied with its part of the contract, as stated in said ordinance No. 64; but "defendant denies that said ordinance No. 10 became and was and now is valid and operative and in full force and effect and obligatory upon both of the parties to this cause;" also

"Defendant denies that under said ordinance and contract it became and was and now is the duty of the defendant to pay complainant as rental for the said hydrants the sum of $1,962.50 on the first day of January and July of each year after the making of the said contract or ordinance."

"Defendant denies that said sum of $1,962.50 is the just sum due under the said contract, and it further and specifically denies that it was and is defendant's duty under said contract or ordinance to levy and collect a tax sufficient to meet said alledged semi-annual obligations of $1,962.50," and

"Defendant denies, however, that said ordinance was enacted wrongfully and without authority of law, and, on the contrary, insists that the same is valid and in full force and effect. Defendant further denies that said ordinance numbered 64 was and is invalid, illegal, and void by reason of being in conflict with the terms of said ordinance numbered 59 or any other ordinance," and

"Defendant denies that it has at any time or place refused to perform its duty under the contract and ordinance referred to in complainant's bill, but, on the contrary, shows that it has performed and will perform its obligations toward complainant under said ordinance, so far as the same is binding, valid, and of force and effect."

"Defendant admits that it has given out that said contract, so far as it calls for the payment of $1,962.50 semi-annually, is inoperative and invalid, and further admits that it has refused to pay said sum of $1,962.60 semi-annually, and for cause of such refusal defendant, further answering, shows to your honors as follows:

66 That defendant is a municipal corporation organized under the laws of the Territory of New Mexico, as contained in sections 1608 *et seq.*, as amended by the Compiled Laws of said Territory."

"And as such municipal corporation it granted to complainants, a private incorporated company, the right to build, maintain, and operate water works, as hereinafter admitted, and, as hereinafter set forth, defendant contracted with complainant to furnish water as is fully set forth in said ordinance No. 10."

"Defendant further shows that under the law it is authorized, empowered, and required to levy each year and to cause to be collected a special tax sufficient to pay off the water rents agreed to be paid to complainant, provided the said special tax shall not exceed the sum of two mills on the dollar for any one year. Defendant shows that, as practically its entire revenue is derived from its tax levy, it is thus limited in its payment for water rents to the proceeds of a two-mills tax levy on each dollar of taxable property."

"Defendant further shows that for the year 1891 the total assessment for town purposes, as certified by the county assessor, was $628,940; that the town tax rate for said year was five mills on the dollar, making a total possible tax yield — $3,119.70 and giving an actual tax yield of $2,089.52. For the year 1892 the total assessment was $673,900, the tax rate eight mills on the dollar, and the actual amount of taxes collected $3,204.39. For the year 1893 the total assessment was $807,230, the tax rate was six mills, and the taxes actually collected amount to $2,718.83. For the year 1894 the total assessment was $650,620, the tax rate was ten mills on the dollar of taxable property, and the amount of taxes actually collected was $3,616.52. Defendant shows that under the law it paid complainant each year the full proceeds of the two-mills tax levy authorized by law for water rents; that in 1892 it paid complainants the sum of $1,925; in 1893 the sum of $1,800; in 1894, the sum of
67 $1,600, and for 1895 it has under said ordinance numbered 64 levied said special tax of two mills on each dollar of taxable property to meet complainant's water rent. Defendant shows that under the law the total amount appropriated for any purpose for any fiscal year cannot exceed the probable amount of revenue for that year, and that its appropriation of $1,500 in said ordinance numbered 64 for complainant's benefit for the year 1895 in full compliance with plaintiff's legal demand under said contract, ordinance No. 10, as likewise amounts paid for 1892, 1893, & 1894, are in full of all that complainant can in equity and good conscience demand under its contract with defendant. Your defendant, further answering, shows that said alleged semi-annual rental of $1,962.50 claimed by complainant is far in excess of the amount derivable from a two-mills tax levy on the assess-value of the property subject to taxation within said town of Raton, and that said rental, so far as it is in excess of the proceeds of such a tax levy, is illegal, onoperative, and void."

"Defendant further shows that said ordinance No. 10, so far as the same imposes upon the defendant the obligation to pay complainant an annual sum greater than the proceeds of a two-mills tax levy or to impose a tax levy greater than said rate, was and is null, void, and inoperative, the same having been made and entered into by defendant's trustees in violation of law and in excess of the powers confer-ed upon them by the statutes of New Mexico."

"Defendant further shows that said warrants issued to complainant, as set forth in complainant's bill, were and are null and void, having been issued by defendant's trustees in excess of the amount derived from a two-mills levy on each dollar of taxable property, thus and having thus been issued contrary to law and in excess of the authority conferred upon said trustees by law."

"Defendant further shows that — the reasons just mentioned ordinance No. 59 was and is void and inoperative, and that ordinance No. 64 was and is valid and in full force."

68 Such parts of ordinance No. 59 as appear purtenent are as follows, to wit:

"SEC. 1. That the general tax levy for the town taxes for the fiscal

year commencing on the 1st day of April, 1895, shall be and is hereby declared to be ten mills for and upon every dollar, ($1.00) as assessable property, both personal and real, within the corporate limits of the town of Raton, the same to be assessed and collected according to law."

SEC. 2. There is hereby appropriated out of money and revenues covered into the town treasury, or to be collected and paid into the same, from any and all sources, during the fiscal year commencing on the 1st day of April, 1895, whether the same be derived from taxes, licenses, fines, fees or any other source whatsoever for the following purposes and objects, the following sums and amounts, to wit:

To pay all outstanding indebtedness of the town the following amounts: Amount due the Raton Water Works Company, up to January 1st, 1895, $4,735.15.

The sum of $4,735.15 referred to it appears was a deficit claimed by complainant to be due from the defendant up to that date.

The bill of complaint was sworn to, but an answer under oath was expressly waived, and it was not under oath, and no replication filed by the complainant to the bill of complaint.

There were no proofs taken on either side, and the cause was heard on bill and answer. After final decree was entered defendant assigned errors as follows:

"First. That the court below erred in holding that ordinance No. 10 of the town of Raton, granting franchise to the Raton Water Works Company to erect and maintain water works, published July 24, 1891, and alleged to have been duly ratified and confirmed at an election held in the said town of Raton on the first day of August, 1891, became and was and now is valid and operative and in full force and effect and in all respects obligatory upon the town of Raton.

69 Second. That the court erred in finding all the material allegations in the said bill of complaint to be true as therein stated.

Third. That the court erred in decreeing a specific performance of said ordinance No. 10 by and on the part of the town of Raton.

Fourth. That the court erred in decreeing that the town of Raton is, by reason of said ordinance No. 10, indebted to the said Raton Water Works Company in the sums mentioned in the said decree, or in any amount whatsoever, and in decreeing that said town of Raton issue to the said Raton Water Works Company its warrants in payment and satisfaction of the amounts thus found to be due under said ordinance No. 10."

This cause was submitted to this court on briefs.

Warren, Fergusson & Gillett, A. C. Voorees and Wm. C. Wrigley, for appellees.

J. H. Crist and W. H. Pope, of counsel for appellant.

Opinion.

The enactment of ordinance No. 10 by the trustees of the defendant town, a submission and approval of the same by a majority of the electors thereof, and the acceptance of the propositions therein by the complainant corporation are admitted by the answer, and this constituted the contract over the terms, conditions, and construction of which this controversy arose, and of which we are required to determine.

It is alleged in the bill of complaint and admitted by the answer that the water plant of the complainant was constructed in compliance with the requirements of the contract, and that the defendant town is and has been using and reaping the benefits of its part of the results of the contract.

70 It is also alleged and admitted that complainant put in forty-four hydrants in the manner prescribed in the contract, and that by the terms of the contract defendant town, by its board of trustees, agreed and obligated itself to pay for twenty-five of said hydrants twenty-five hundred dollars per annum and for the other nineteen the sum of seventy-five dollars per annum for twenty-five years, and that the defendant town agreed to pay as such water rentals the sum of $1,962.50 semi-annually on the first day of January and July of each year thereafter for the period of said twenty-five years.

The defendant town avers that the contract so made is void *pro tanto*, if not void in toto, because it avers that it, the defendant town, is limited by statute to an assessment and levy of not to exceed two mills on the dollar of its taxable property to pay such water rents each year, and no more, and that the sum derived from a two-mills levy each year is not sufficient to pay the sum of $1,962.50 semi-annually each year, as provided in said ordinance and contract, and that trustees of the defendant town had no authority to bind it by the passage of said ordinance No. 10 and the making of the contract thereunder, and that such action was *ultra vives* and void *pro tanto*.

The reply to this by the complainant corporation is that while the proceeds derived from the two-mills levy is insufficient to pay the said sum of $3,925.00 per annum, yet the defendant town has the authority under the statute, and that it is bound under the terms of the said ordinance and contract to pay any deficiency which may arise over and beyond the two-mill levy out of the taxes collected for general current expenses, and the trustees of the defendant town had full authority to enact ordinance No. 10 and to make the contract thereunder after the same had been submitted to and voted for by a majority of the qualified electors of said defendant town corporation, and that the defendant town is bound thereby.

71 This brings us up to the issue in the cause, as stated in complainant's brief.

Is the contract between the parties hereto provided for a semi-annual payment of $1,962.50 as water rent void?

A court should labor to sustain the validity of a contract entered into in good faith and where no fraud appears and where a consideration has passed from the one and been received by the other so long as there is any apparent authority existing at the time in the parties thereto for the making of the same, and the burden rests upon those who attack its validity to make it appear that it is voidable—void *pro tanto* or void *ab initio*.

On the other hand, a court should not hesitate to declare a contract void when it is made to appear for any reason that it should be done, and this rule should apply and does apply as to all classes of contracts, whether between corporations and individuals or between individuals.

It appears that both the complainant, Water Works Company, and the defendant, Town of Raton, were duly and legally incorporated under the laws of this Territory, and that said defendant town corporation was organized and exists under and by virtue of the general incorporation laws of the Territory from sec. 1608 to and including sec. 1724 of the Compiled Laws (1884) and the amendments thereto relating to incorporated cities and towns, and the authority for making the contract in question is found in that statute, and the part applicable thereto is as follows, to wit:

"Sec. 1622, paragraph 71:"

"And if the right to build, maintain and operate such works is granted to private individuals or incorporated companies by such cities or towns, and said cities or towns shall contract with said individuals or companies for a supply of water or gas for any
72 purpose, such city or town shall levy each year, and cause to be collected a special tax, as provided for above, sufficient to pay off such water or gas rents so agreed to be paid to said individuals or company, *or company* constructing said works: Provided, however, that said last-mentioned tax shall not exceed the sum of two mills on the dollar for any one year."

It is shown in defendant's answer, and it is not denied by any replication or proofs by complainant, that it has paid complainant the proceeds of a two-mills levy and more each year on all the taxable property within defendant's corporate limits since the contracts was entered into. It further appears in the answer that the total assessed valuation of the property subject to taxation within the corporate limits of said defendant town in the year 1891, and at the time the contract was entered into, was $628,940, and that the total tax yield for that year on a five-mills levy was $2,089.52, being only $127.02 more than one-half the money to make one semi-annual payment. For the year 1894 the total assessed valuation was $650,620, the levy was ten mills on each dollar of the assessed valuation, the full limit allowed by law, and the amount of taxes actually collected was $3,616.52. This was the largest sum collected in any one of the four years, and was insufficient to pay the yearly water rental contracted by defendant to be paid to the complainant,

thus consuming all the revenues of defendant town arising from taxation and creating a deficiency of $308.48.

The total amount of taxes collected for the years 1892, 1893, and 1894 amounted to the sum of $9,539.74. The total amount due complainant under the contract for this period beginning July 1st, 1892, the date the water works was accepted by defendant town, was $9,812.50. Thus it is plainly shown that the entire sum derived from taxes collected as levied on the property subject to taxation within the corporate limits of the defendant town was insufficient to pay the water rents contracted to be paid by it. To meet the deficiencies as they occurred from time to time the defendant
73 issued its warrants, and it appears from ordinance No. 59, in the record here, that on March 18th, 1895, there was a deficit due complainant of $4,735.15, after having received from the defendant the sum of $5,325.00 as water rents, and which it avers was fully two mills on the dollar of its taxable property during that time, and it contends that the warrants issued in payment of said deficiency were so issued by its trustees without authority of law, are in excess of the amount authorized, and are void.

It is not shown from what other sources the defendant derives revenues, but it avers that practicably all is derived from taxes collected from the levies made on all of its property subject to taxation.

It also appears from the record, ordinance No. 59, which complainant here seeks to have enforced, that on the first day of April, 1895, the then existing indebtedness of the defendant town was about $7,000, and that the appropriations for the current expenses for the fiscal year from that time to April 1st, 1896, was about $6,000. The record does not disclose the assessed valuation of the property subject to taxation within the limits of the defendant town for the year 1895, but assuming that it was about the same as that of the previous year the tax yield would fall short of the amount required to pay the water rents, even *with* a ten-mills levy, the full limit allowed by law for all purposes, had been made each year.

It appears that the cause was set down and heard on the bill and answer in pursuance of a stipulation of the parties thereto, but the stipulation does not appear in the record, and the averments in the answer, well pleaded, are presumed to be true. "If no replication is filed, the matters of defense set up in defendant's answer will on hearing be considered as admitted by the plaintiff, although the answer is not under oath." Equity rule 34 of this court, 1 Daniel Ch., sec. 846, and note.

74 We are now brought directly to the firs- question for determination: Had the trustees of the defendant town corporation the authority to enact ordinance No. 10 and enter into the contract in question, and thereby bind the defendant town to pay out of the revenues derived by taxation for the general purposes any sum in excess of that to be derived from a levy of two mills on the dollar on its taxable property for each year? We are of the opinion that the trustees did not have authority and power

to so contract and bind defendant town in the manner as provided in said ordinance No. 10.

The statute, paragraph 71, *supra*, after the provisions authorizing cities and incorporated towns to construct and operate water and gas works, and for the assessment of water and gas rents in the inhabitants using the same, says: "And at the regulaw time of levying taxes in each year, said city or town is hereby empowered to levy and cause to be collected, in addition to other taxes authorized to be levied, a special tax on taxable property in said city or town, which tax, with the water or gas rent hereby authorized, shall be sufficient to pay the expenses of running, repairing, and operating such works."

There is no ambiquity or doubtful meaning about this part of the statute. It clearly means just what it says—that is, that the proceeds from "a special tax" and the proceeds derived from the water rents prescribed by ordinance "shall be sufficient to pay the expenses of running, repairing, and operating such works * * * ." This applies when a city or incorporated town constructs its own water works, and there is no intimation whatever that any other revenues shall be applied to the support and maintainance of the water works, and no interpretation can be read into this part of the statute by which the trustees of a town constructing its own water works would be authorized to apply any of the revenues levied and collected for the general and current expenses of the town to the support and maintainance of its own water works.

75 When the right to construct and maintain such works is granted to individuals or incorporated company, and shall contract for a water supply for any purpose, "such city or town shall levy each year, and cause to be collected a special tax, as provided for above, sufficient to pay off such water or gas rents so agreed to be paid to said individuals or company, constructing the works."

Again it is provided that "such city or town shall levy each year and cause to be collected a special tax, as provided for above," sufficient to pay off all such water rents agreed to be paid to such company. The phrase "as provided for above" refers back to the conditions wherein the city or incorporated town constructs the water works, and can mean nothing else.

Now, what is meant by the words "a special tax" is fully explained in the proviso to this paragraph as follows: "Provided, however, that said last-mentioned tax shall not exceed the sum of two mills on the dollar for any one year." By this proviso the "special tax" is limited to the proceeds derived from a two-mills levy for any one year to pay for water rents provided for in said ordinance No. 10 and the contract thereunder. This proviso is manifestly a limitation on the sum to be paid for the water rents by the special tax and an inhibition on the trustees of defendant town from paying any more than the sum derived from a two-mills levy on the dollar upon the property subject to taxation within its corporate limits.

"The office of a proviso, generally," said Mr. Justice Story, in Minis *vs.* U. S., 15 Pet., 424, "is either to except something from the

enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview."

Mr. Chief Justice Fuller, in Austin *vs.* United States, 155 U. S., 417 (15 Sup. Rep., 167), says: "While we concede that the law does not attach a fixed and invariable meaning to a proviso, we
76 think it clear that this proviso negatived the authority granted beyond the limit defined." The limit defined by the proviso now under consideration is the proceeds derived from a levy of two mills on the dollar of the assessed valuation of the taxable property in each year for water rents.

That is, the trustees of the defendant town can assess, levy, collect, and apply each year the proceeds arising from two mills on the dollar of all taxable property in payment of the water rents, and no more. This sum, together with the water rents it receives from the consumers of its product, puts the complainant water company on the same and an equal footing with the defendant town had it constructed its own water works; and it is not contended nor is there any reason why the water company should have any other or more extensive rights granted it than the town corporation would or should have had if it had elected to construct and maintain its own water system.

The general incorporation law under which the defendant town was incorporated provides, sec. 1724 (C. L. 1884): "No more than one per centum ad valorem shall ever be levied or collected, by any corporation organized under this act, upon the assessed value of the taxable property situate within the limits of such corporation for all purposes, and no indebtedness shall be incurred which will require any greater annual expenditure, than one per centum will fully pay off and satisfy."

It is apparent from this section that the defendant town corporation, as well as all similar municipal corporations organized under this act, are limited to an assessment and levy of one per centum of each dollar of taxable property lying within the corporate limits in payment of all expenses incurred for all purposes; and no indebtedness shall be incurred which will require any greater annual expenditure than the sum so realized shall fully pay off and satisfy.

The construction here placed upon par. 71 of sec. 1622 is supported by paragraph 6 of the same section, which provides that cities or incorporated towns may contract an indebtedness
77 by borrowing money or by issuing bonds "for the purpose of the purchase or construction of water works for fire and domestic purposes;" but it is further provided in this paragraph as follows: * * * "and no loan for any purpose shall be made, except it be by ordinance, which shall be irrepealable until the indebtedness therein provided for shall be fully paid, specifying the purpose to which the funds to be raised shall be applied, and providing for the levying of a tax not exceeding, in total amount for the entire indebtedness of the city or town, (excepting such debt as may be incurred in supplying the city or town with water or water works,) eight mills upon each dollar valuation of the taxable prop-

erty within the city or town, sufficient to pay annual interest and extinguish the principal for such debt within the time limited for the debt to run, * * * and provided that said tax, when collected * * * shall only be applied to the purpose in said ordinance specified, until the indebtedness shall be paid and discharged."

This paragraph limits the assessment and levy for all purposes except for water or water works to eight mills on each dollar of the assessed valuation of the taxable property, and paragraph 71, *supra*, fixes and limits the special tax provided to be collected for water rents at two mills, and sec. 1724 limits the total levy and collection to ten mills on each dollar of the assessed valuation of the taxable property within the corporate limits of the town, and it seems to us that the trustees of defendant corporation are clearly limited to the payment for water rents to the revenue derived from the two-mills levy each year.

Complainant contends that if the levy of the special tax of two mills was insufficient to pay the water rents, that then it was the duty of the defendant's trustees to pay any deficiency out of other revenues available from the funds for other and general purposes. But this position is untenable, for the reason, first, because par. 6, *supra*, provides "that said tax, when collected, shall only be applied to the purposes in said ordinance specified." This prohibits
78 the trustees from diverting any revenues assessed and collected from the purposes specified in the ordinance for which such levy and collection was made. And, second, because it is shown that the largest sum realized in any one year was $3,616.52 on a levy of ten mills on the dollar upon all the property subject to taxation within the corporate limits of the defendant town, an amount clearly insufficient to pay the annual water rents of that year of $3,925.00, thus leaving for the other current expenses of the town corporation, which, as shown by complainant's own exhibit, ordinance No. 59 for 1895, amounted to over $3,000; and, third, because the trustees of the defendant were prohibited from assessing, levying, or collecting more than ten mills on the dollar for all purposes, general and special.

The language employed in the statutes hereinbefore extracted from seems to be clear and positive, and that no reasonable doubt can exist as to the construction to be placed upon them. They bristle all over with limitations and provisions on the subject and powers of taxation, and right well they may for the protection of the tax-payers.

In City of Litchfield *vs.* Ballow, 114 U. S., 190 (5 Sup. Ct. Rep., 820), a cause involving similar principles, Mr. Justice Miller, speaking for the court, said: "The language of the Constitution is that no city, &c., shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property. It shall not become indebted; shall not incur any pecuniary liability. It shall not do this in any manner, neither by bonds, nor notes, nor by express or implied promises, nor shall it be done for any purpose, no matter how urgent, how useful, how

unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt in any manner nor for any purpose whatsoever. If this prohibition is worth anything, it is as effectual against the implied as the express promise, and is as binding in a court of chancery as a court of law."

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In Loan Ass'n *vs.* Topeka, 20 Wall., 660, the court said, in referring to general powers and restrictions in the statute: "It is therefore to be inferred that when the legislature of the State authorizes a county or city to contract a debt by bond it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself or in some general statute a limitation upon the power of taxation which repeals such an inference."

As has before been shown, we have special provisos and a general statute limiting the indebtedness for any and all purposes to ten mills on each dollar on the assessed valuations for each year.

Davenport *vs.* Kleinschmidt, 13 Pac. Rep., 249.

"The assessed valuation of the city of York was the sum of $335,000.00. The vote authorized the issue of and it is now sought to compel the defendant (city mayor) to certify bonds to the amount of thirty thousand dollars, bearing interest at the rate of sic per centum per annum. 'The statute limits the levy of a tax for water works to an amount not exceeding five mills on the dollar in any one year and all the property within such city or village as shown and valued upon the assessment-rolls.' This is a limitation upon the powers of the city counsel, beyond which they have no authority to issue bonds." State *vs.* Babcock, 20 Neb., 522.

Complainant insists that under pars. 2 and 3, sec. 1622, *supra*, the defendant had authority and its duty was to assess, levy, and collect taxes for general and special purposes sufficient to pay all debts it contracted. Among the powers conferred on municipal corporations, said par. 2, is: "To appropriate money for corporate purposes only, and provides for payment of debts and expenses of the corporation." Par. 3 is: "To levy and collect taxes for general and special purposes on real and personal property." There is nothing in either paragraph requiring a different construction than as before given and nothing to change the effect of the limitation in para. 71, *supra*. If there had been nothing in the act to the contrary, it might perhaps have been fairly inferred that it was the intention of the legislature to grant full power to tax for the payment of the extraordinary debt authorized to an amount sufficient to meet both principal and interest at maturity. This implication is, however, repel-ed by the special provision for a tax of one-twentieth of one per cent.; and the case is thus brought directly within the maxim "*expressio unius est exclusio alterius.*" United States *vs.* Macon County, 9 Otto, 582.

80

But it is further insisted by the complainant that it invested $115,000 in the construction of its water-works system and has fulfilled all the conditions in the contract to be by it performed, and

that the defendant town corporation has received the benefits accruing to it by the terms of said contract, and that it should be required and is bound to pay for the same according to the terms and conditions of said contract, and that it should not be permitted to repudiate its obligations therein contained, and that it would be contrary to public policy and a violation of its public duty to permit it so to do.

With the conscience of the defendant corporation (if it has any), its moral obligations, or the question of public policy, if any such question is here involved, this court in this cause, as it is here presented, has no concern whatsoever. The question for this court is one purely of law, as to the rights of these two corporations, and must be considered and determined as presented to us on the bill and the answer, and we have said before that the trustees of the defendant had no authority in law to enter into the said contract in such a manner as to bind the defendant town to pay for water rents any sum in excess of the proceeds derived from a levy of two mills on each dollar on the assessed valuation of all property subject to taxation within the corporate limits of the defendant town each year during the continuance of said contract. This they were authorized to do, and no more.

If the representatives of the complainant had, before they
81 entered into the contract, turned to the public statutes under which it was made, they would have seen what is apparent to us, and what would seem no two persons or ordinarily sound and discriminating judgment could have arrived at a different conclusion, was a clear, distinct, and positive prohibition against the payment of more than the proceeds arising from said two-mills levy. These statutes were public notice as to their contents and alike binding on both corporations.

The complainant knowing, as it is presumed to know, that the defendant was limited by the statute of its creation to a two-mills levy for the discharge of its obligations under ordinance No. 10, it should not be heard to complain that the trustees of the town refuse to transcend that power. Complainant made this contract with its own eyes open, and when the law advised it that its two-mills levy was sacred against the demand of other creditors furnishing protection just as necessary for the well-being of citizens as complainant it also advised it that the other eight mills within the ten-mills limit of taxation for all purposes was sacred from a claim of this nature.

The difficulty lies in the want of original power. While there has undoubtedly been great recklessness on the part of the municipal authorities in the creation of bonded indebtedness, there has not unfrequently been gross carelessness on the part of the purchasers when investing in such securities. Every purchaser of a municipal bind is charg-able with notice of the statute under which the bond was issued. If the statutes gives no power to make the bond, the municipality is not bound; so, too, if the municipality has no power, either by express or grant or by implication, to raise money by taxation to pay the bond, the holder cannot require the munic-

ipal authorities to levy a tax for that purpose. If the purchaser in this case had examined the statutes under which the county was acting, he would have seen what might prove to be difficulties in the way of payment; as it is, he holds the *the* obligation of a debtor who is unable to provide the means of payment. We have no power by mandamus to compel a municipal corporation to levy a
82 tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation. In this case it appears that the special tax of one-twentieth of one per cent. has been regularly levied and applied and no complaint is made as to the levy of the one-half of one per cent. for general purposes. What is wanted is the levy beyond these amounts, and that, we think, under existing laws, we have no power to order. United States *vs.* Macon County, *supra.* And so in Law *vs.* The People, 87 Ills., 385: "It is said that to so hold will work great hardships and injustice on the holders of these certificates of indebtedness. The same may be frequently said of any other persons who violate the law or act contrary to its provisions. The persons loaning this money did it in the face of this constitutional provision and the prohibition contained in the 62nd section of the charter. The law is, and all persons are presumed to know it, that municipal bodies can only exercise such powers as are conferred upon them by their charters, and all persons dealing with them must see that the body has power to perform the proposed act." * * * "But should it work hardships to individuals, that by no means warrants the violation of a plain and emphatic provision of the Constitution. The liberty of the citizen and his security in all his rights in a large degree depend upon a rigid adherance to the provisions of the Constitution and the laws and their faithful performance. If courts, to avoid hardships, may disregard and refuse to enforce their provisions, then the security of the citizen is imperiled. The will—it may be unbridled will—of the judge would usurp the place of the Constitution and the laws, and the violation of one provision is liable to speedily become a precedent for another, perhaps more flagrant, until the constitutional and legal barriers are destroyed, and none are secure in their rights." Law *vs.* The People, 385; Coler *vs.* City of Cleburne, 131 U. S., 162 (9 Sup. Ct. Rep., 720).

83 Under our form of government there is no power more frequently used as an abuse than the power *of* levy and collect a tax, and while it is absolutely necessary to levy and collect taxes sufficient for the proper and necessary support of the Government, either general, local, or special, yet experience has taught that this power has been ofter used to oppress the citizens and to deprive him of his property and his natural rights, and only too often for the benefit of the reckless and careless adventurer and speculator, and then when an attempt is made to check them in th-ir adventures and reckless career by envoking the aid of the law in behalf of the legal rights of the citizen they cry out repudiation. There is no such thing as repudiation when there is no original authority vested in the taxing power by which it is sought to levy and collect the tax;

and courts always have and always must arrest any attempt to enforce the collection of a tax when it is apperent that the power to so do was not originally and clearly vested in the taxing power.

A case which tested the very foundation, strength, and stability of our Government more thoroughly than any other, perhaps, was McCullaugh *vs.* The State of Maryland, 4 Wheat., 316, in which Marshall, the great Chief Justice, said: "That the power of tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create. * * * But all inconsistanc-es are to be considered by the magic of the word confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which would banish that confience which is essential to all governments."

Instances are not infrequent where municipalities through the power to tax have attempted through that power to illegally and inequitably oppress private corporations of a quasi-public nature, and courts have been compelled to restrain such unauthorized efforts; and were courts to permit careless, pliable, or corrupted
84 trustees of corporations to use their ps-udio authorities unbridled the power to tax would certainly in many instances carry with it the power to destroy; and the laws so authorizing the taxing power must be construed liberally in favor of the citizen and strictly against the power invoked to enforce it. Webster *vs.* People, 98 Ills., 343; 15 Am. & Eng. Enc. Law, 1116.

It is contended by the complainant that our general incorporation law for the organization of cities and towns is taken from the Iowa statute on the same subject. That may be true, but it is almost a verbatim copy of the Colorado statute, and we feel satisfied that the construction put upon the statute by the supreme court of Colorado is in effect to support the construction here given our own statute. People *vs.* May, 10 Pac. Rep., 641; Sullivan *vs.* City of Leadville, 18 Pac. Rep., 736; Town of Durango *vs.* Pennington, 7 Pac. Rep., 14; Lake County *vs.* Rollins, 130 U. S., 662 (9 Sup. Rep., 651); Dixon Co. *vs.* Field, 111 U. S., 83.

It is provided by statute that cities have the power to erect water works or authorize the erection of the same, and where such authority is granted to individuals or corporations the city may authorize a charge for the use of the water to be collected from the individuals using the same, and a special tax not exceeding five mills on the dollar in any year, in addition to all other taxes, may be levied for the purpose of paying the expenses and operation of works, and which tax, with the water rents, shall be sufficient for that purpose. * * *

The obligation of the city is to levy the tax and see that the amount collected is applied to the specific purposes. If the special fund legally provided is not sufficient, then it may be well said the deficiency is not payable by the city and it is difficult to conceive that there can be such a thing as a debt which is never to be paid. No burden is created thereby and there cannot be such an indebtedness.

Burlington Water Co. *vs.* Woodward, 49 Io., 58.

It is contended by counsel for complainant corporation that the case of The Creston Water Works Company *vs.* The City of
85 Creston, recently decided by the supreme court of the State of Iowa and reported in N. W. Rep., is decisive of the question at issue here, in which that court held in that case that "the limitations in sec. 643 are not upon the power to contract for a supply of water for public use, but upon the power to levy this special tax in aid of the payment therefor. When within the limit of the five-mill tax the supply can be thus paid for, it must be so so paid, but when that source is not sufficient the deficiency may be paid from the general revenues."

It may be said that sec. 643 of the Iowa statute is substantially the same as para. 71 of sec. 1622 of our statutes.

The distinction here drawn in the case is between the power to contract for a thing and the power to raise money by taxation to pay for the thing contracted for, and is evidently based upon the well-established principle that a city or municipality has two classes of powers, namely, gover-mental of public power and the proprietary or business powers of a quasi-public-power nature.

The first is derived directly from the legislative grant and the second from the discretionary powers inherent in the officers of the municipality, and it is not within the province of a court to contract or clip the legislative grant or to restrain or circumvent the discretionary grant or power so long as it is founded upon sound discretion and good business principles, transacted in good faith and within the scope of the discretionary powers. Illinois Trust and Savings Bank *vs.* City of Arkansas City, 76 Fed., 271, and cases cited.

In the case under consideration the board of trustees of defendant town had a discretionary grant or power to enter into a contract with complainant corporation for the construction of the water works, the quantity of the water supply to be furnished, the number and size of the hydrants and the price of the hydrant rentals to be paid, the size and extent of the water mains, the period
86 for which the contract should run, within, of course, the statutory period, the pressure and quantity of water, and the price to be paid by private consumers of the water, etc.

The legislative grant prescribed the manner in which the revenues should be raised with which payments for the water used by the municipality should be made, and restricted this grant to a special tax levy of two mills on each dollar of taxable property each year and such other sums as should — realized from the private consumers, and it also gave the authority to make the contract and prescribed the time within which it should run, and to fulfill the conditions of the contract so made.

But the power to make the contract and to execute the proprietary grant and the business portion of a quasi-public nature did not carry with it the power to depart from the course prescribed by the statute for raising revenues with which to pay for the supply of water so contracted to be furnished. To so hold would be to confer upon the trustees of a municipality the power to abrogate the plain

provisions of the statute, which says: "Provided, however, that said last-mentioned tax shall not exceed the sum of two mills on the dollar for any one year."

It has been seen that the revenues of the defendant town, realized from all sources in any one year, were not sufficient to meet the current expenses of the municipality, and to hold that the deficiency arising after exhausting the sum realized from the two-mills levy might be made up and supplied from the general revenue would be to permit all the revenues to be consumed in the payment of water rentals, and to allow all other municipal obligations to remain unsatisfied, because it has been before shown (sec. 1724, C. L. Laws 1884, *supra*) that no more than one per centum ad valorem shall ever be levied or collected for all municipal purposes by any town or city corporation organized under this act, and "no indebtedness shall be incurred which will require any greater annual expenditure than said one per centum per annum will fully pay off and satisfy."

87 If it shall appear that the sum to be realized from a two-mills levy is insufficient to satisfy the water rentals contracted for, that is a matter for legislative and not judicial determination.

It is not reasonable to presume that the legislature intended to confer upon the boards of trustees of municipal corporations the power to make contracts within the scope of their administrative duties which would consume all the revenues derived from the ad valorem tax of the municipality for one single purpose, in this instance in satisfaction of water rentals, and leave all other obligations incurred by them to remain unsatisfied.

We do not think the authority directly in point for other reasons, because the five-mills levy that was the maximum to be levied rest on the entire taxable property in the corporate limits, but only in that receiving benefit and protection, while under our statute the special tax for water runs to everything taxable in the same way that the general tax does. Also, the fact of there being an absolute inhibition against levying more than eight mills other than for water is a feature not referred to in the cases last cited, and this is a distinction also, in our view, important.

The Montana State statute provides that "the amount of corporation taxes to be assessed and levied in any one year for general municipal or administrative purposes shall not exceed three fourths of one per centum and for fire and water purposes one-half of one per centum on the assessed valuation of such property and such special assessments as may be levied from time to time."

In passing on this statute in State *vs.* Mayor, etc., the City of Great Falls, 49 Pac., 15, the court said: "We are of opinion that this law became a part of the contract embodied in said ordinance, and that relator had a right to insist that, in so far as may be necessary to pay what was due it for hydrant rentals in accordance with the rates prescribed in the ordinance contract act, a

88 special tax, as provided for in act, should be levied annually, of course, in only such sums as should be needed, and not

exceeding the five-mill limit. The contract was entered into in contemplation of a special fund being created by the city to meet liabilities incurred thereunder, and the legislature, in said act, contemplated at the time that cities of the Territory should pay for water used by them for sewerage and fire purposes from taxes levied and collected for that specific purpose."

In the case at bar there is no complaint that the property subject to taxation has not been properly assessed, or that the proceeds of the two-mills levy have not been properly collected and applied, nor that the privileges granted complainant corporation constitute an exclusive franchise in the nature of a monopoly, and therefore void for that reason. These questions would have to be determined in another action.

Coy *vs.* Lyons City, 17 Io., 1, was a mandamus proceeding and applicable to the case at bar. Almost all of the Iowa authorities cited are with respect to indebtedness, and we believe, after a careful and considerate examination of all of them, that they do not apply or in any material manner — respect differ from the position here taken.

It is insisted by complainant that the case of City of Valparaiso, 97 Ind., 1, supports this position, but we are of the opinion, after a careful examination, that it is not in conflict with the conclusions we have arrived at in the cause at bar. All that was decided in that case was as to what constitutes an indebtedness, and we fully concur in the conclusions stated by that court. It held in substance that municipal bonds or negotiable obligations of any kind did constitute an*d* indebtedness, but that a contract to pay a certain fixed sum per month or per year for a certain term of years did not constitute an*d* indebtedness within the meaning of the constitutional or statutory limitations.

We do not hold that the contract in question here creates
89 an indebtedness as contemplated by our statutes or the act of Congress by which the complainant agreed to furnish and supply water for forty-four hydrants, for which defendant agreed to pay semi-annually the sum of $1,962.50 or $3,925.00 per year for twenty-five years, making a total sum for that time of $98,125.00. If that were an indebtedness, the contract would be clearly void, because it would be for an indebtedness beyond the limitation of four per centum prescribed by the act of Congress approved July 31, 1886, as well also the statutory limitation.

The complainant might fail to perform its part of the contract or the defendant might forfeit its right to receive the water some time during the continuance of the contract, and on the occurring of either event the contract would on a proper showing be declared at an end; then no further obligation would rest on either party to the contract.

It does not constitute an indebtedness for the whole amount *in presenti*. It is a continuing contract from year to year and is binding on both parties so long as the conditions therein are not broken. There — nothing negotiable about it in the legal sense of the term. Dill. Mun. Corp. (4th ed.), sec. 136.

The trustees of the defendant town corporation had no authority to enact and enforce ordinance No. 64, passed May 23rd, 1895, so as to in any manner change or effect the appropriations then existing for that fiscal year as provided for by ordinance No. 59, enacted in March, 1895, for the fiscal years 1895 and 1896, and it is therefore void to that extent.

"SEC. 1636 (C. L., 1884). The fiscal year of each city or town organized under this act shall commence on the first day of April in each year, or at such other time as may be fixed by ordinance. * * * The * * * board of trustees in towns shall within the last quarter of each fiscal year pass an ordinance to be termed an annual appropriation bill for the next fiscal year, in which such corporate authorities may appropriate such sums of money as may be deemed necessary to defray all expenses and liabilities of such corporation, and in such ordinance shall specify the objects and purposes for which such appropriations are made, and the
90 amounts appropriated for each object and purpose."

Ordinance No. 59 seems to have been passed in accordance with this statute, and should not be permitted to be changed, so far as its appropriations are legal, by ordinance No. 64, which seems to have been passed on May 23rd, 1895, after the time provided by statute.

The trustees may fix any time for the beginning of the fiscal year, so long as it does not change appropriations already made, in a regular*ly* and orderly manner. Sullivan *et al. vs.* Leadville, 18 Pac., 736.

The statute, sec. 1649, requires the treasurer of the town to keep a book, and to register therein each town warrant, order, or other certificate of such town indebtedness in the order in which it is presented, whether it is paid at the time of such presentation or not.

"SEC. 1650. Every fund in the hands of the treasurer of any such city or town of this Territory for disbursements, shall be paid out in the order in which the orders drawn thereon and payable out of the same shall be presented for payment."

The trustees of the defendant town had no authority to pass and enforce ordinance No. 65, by which it was attempted to make town warrants issued after June 1st, 1895, receivable in payment of town licenses. The law provides that they shall be paid in the order of their presentation, as they appear from the book of registry required to be kept by the town treasurer, and not otherwise. The purpose of this ordinance is bad, in that it may permit speculations in town warrants, it might lead eventually to the issuance of warrants not authorized, and it is an effort to divert public funds from their proper channel, and it is void to that extent. Fazende *vs.* City of Houston, 34 Fed. Rep., 95.

It is not quite clear as to just what perm*i*nent and final relief complainant could obtain, even though the bill should be sustained and the prayer granted in all its parts, because the prayer is, first, for specific performance of ordinance No. 10 for the enforcement of the contract. This court, in a proceeding of this nature,
91 may declare the validity of the contract, but if the trustees

should refuse to make the levy contended for, which it is alleged and admitted they have done, then mandamus must be resorted to, to compel them to make it. This is in reality the foundation of this whole proceeding. We think an action at law by mandamus to compel the levy to have been made would have disposed of the whole matter at once. "If the city (in this cause the town) is liable for this money, an action at law is the appropriate remedy. The action for money had and received to the plaintiff's use is the usual and adequate remedy in such cases, where the claim is well founded, and the judgment at law would be the exact equivalent of which is prayed for in this bill, namely, a decree for the amount against the city, to be paid within the time fixed by it for ulterior proceedings. In this view the present bill fails for want of equitable jurisdiction; (2) but there is no more reason for recovery on the implied contract to repay the money than the express contract found in the bonds." City of Litchfield *vs.* Ballow, *supra.*

So if the warrants, upon which payment is sought here, are valid, an action at law is the proper remedy to enforce their payment. They have been issued and are claimed to be outstanding obligations against defendant town, and it says they are void, and therefore declines to pay them. Then, if in an action at law judgment should be entered in favor of the legal holders and defendant's trustees should decline to provide for their payment, mandamus would be the proper remedy to compel the necessary levy.

State *vs.* Mayor of City of Great Falls, 49 Pac., 15.

Illinois Trust and Savings Bank *vs.* City of Arkansas City, 76 Fed. Rep., 571.

We conclude that ordinance No. 10 and the contract made thereunder are not void, but that the language of sec. 11 of said ordinance that the said town agrees to levy and collect a tax sufficient, &c., means and should be construed as an obligation for the town
92 to exhaust its power, if necessary, to collect a tax sufficient, etc., within the limit of levying two mills upon the entire taxable property within its corporate boundaries. This provision of the law is to be read into the ordinance and the contract thereunder. As the town has heretofore, it is undisputed, more than complied with its obligation by paying an amount in excess of what could have been derived from a two-mills levy, and as ordinance No. 64 provides for the entire proceeds of a two-mills levy being paid to complainant, it is apparent its bill is without equity and should be dismissed.

The decree entered in the court below is reversed, and the bill of complaint will be dismissed, and an order will be entered directing the lower court to dismiss the bill at the costs of complainant, The Raton Water Works Company, and it is so ordered.

N. B. LAUGHLIN,
Associate Justice, etc.

We concur.

N. C. COLLIER, *A. J.*
H. B. HAMILTON, *A. J.*
GIDEON D. BANTZ, *A. J.*

93 And afterwards, to wit, on the 31st day of August, 1897, there was filed in the office of the clerk of the said supreme court a motion for rehearing; which said motion is in the words and figures following, to wit:

RATON WATER WORKS COMPANY, Appellee,
vs.
TOWN OF RATON, Appellant. } 705.

To the honorable the supreme court of the Territory of New Mexico:

Your petitioner, The Raton Water Works Company, the appellee in the above-entitled cause, respectfully moves the court for a rehearing of said cause, and shows unto the court the following grounds of this motion.

I.

The court erroneously directed the district court for Colfax county to dismiss the bill of complaint filed in said cause at the cost of complainant therein for the reasons:

A. No demurrer to or motion to dismiss the said bill was filed by or on behalf of the defendant and appellant in said cause.

B. The said cause was, by stipulation of the parties thereto,
94 submitted to, heard and determined by said district court and by this court upon the bill of complaint and the answer thereto of the defendant, and all objections to the form and sufficiency of said bill were waived.

C. Although the entire prayer of complainant's said bill for specific performance of said contract, ordinance No. 10, cannot be allowed under the decision of this court, yet the complainant is entitled to the relief prayed as against the enforcement of ordinance No. 64 and ordinance No. 65 of said appellant, Town of Raton, respectively, and for other purposes, and complainant's bill should be retained for the said purposes, and the same should not be dismissed, but said cause should be remanded to the court below for further proceedings, in pursuance of the order and decision of this court.

II.

The decision of this court is in conflict with controlling or prepondering decisions upon the above points, to which the attention of this court has not been called by inadvertence of counsel.

III.

The court erred in determining that complainant and ap-
95 pellee is not entitled to receive from defendant and appellant any amount in excess of the proceeds of a tax not exceeding two mills on each dollar of taxable property of said town in each year in payment of the indebtedness of said town accrued and accruing under said contract, ordinance No. 10, and in determining that said semi-annual amounts accrued and accruing to complainant under and in pursuance of said contract do not constitue an indebtedness of said appellant, Town of Raton.

IV.

By inadvertence of counsel the attention of the court was not called to authorities upon said points, which counsel deem author-a-tive, if not controlling, upon the honorable court. Wherefore appellee prays that the judgment and order herein be vacated and that said cause may be reheard, and for all proper relief in the premises.

WARREN, FERGUSSON & GILLETT,
A. C. VOORHEES, *Solicitors for Appellee.*

We hereby certify that the above and foregoing motion, in our opinion, is well founded in point of law and in fact.

WARREN, FERGUSSON & GILLETT,
A. C. VOORHEES, *Solicitors for Appellee.*

96 And afterwards, to wit, on the thirty-fifth day of said term of said supreme court, the same being Monday, January 10th, 1898, the following, among other, proceedings were had, to wit:

RATON WATER WORKS COMPANY, Appellees,
vs.
TOWN OF RATON, Appellant.
} Appeal from District Court for Colfax County.

It is ordered by the court that the motion for a rehearing heretofore filed herein be, and the same hereby is, denied and overruled.

And afterwards, to wit, on the said 10th day of January, A. D. 1898, there was filed in the office of the clerk of the said supreme court of the Territory of New Mexico a motion for an appeal; which said motion is in words and figures following, to wit:

97 In the Supreme Court of the Territory of New Mexico, July Term, 1897.

RATON WATER WORKS COMPANY, Appellee,
vs.
TOWN OF RATON, Appellant.
} No. 705. In Equity.

The Raton Water Works Company, the appellee in this court in said cause, moves the court for leave to appeal from the final decision of this court herein to the Supreme Court of the United States and to file an assignment of errors and an affidavit showing that the amount and value in controversy in this cause exceeds five thousand dollars, and that this court make, allow, sign, and certify a statement or certificate of facts herein, in pursuance of the practice and procedure in such case and in conformity with law.

H. L. WARREN,
A. C. VOORHEES,
Sol's & Att'ys for said Appellee.

98 And afterward, to wit, there was filed in the office of the said clerk of the supreme court of the Territory of New

Mexico, on the 10th day of January, A. D. 1898, an affidavit of value; which said affidavit of value is in the words and figures following, to wit:

99 In the Supreme Court of the Territory of New Mexico.

RATON WATER WORKS COMPANY
vs.
TOWN OF RATON. } In Equity.

Appeal from the district court of the fourth judicial district in and for the county of Colfax.

A. C. Voorhees, of lawful age, being duly sworn, on oath says that he is resident of the city (formerly town) of Raton, in the county of Colfax and Territory of New Mexico, and that the value and amount of money involved and in controversy in the above-entitled cause is more than five thousand dollars ($5,000.00), principal, over and above all interest, damages, and costs.

A. C. VOORHEES.

Subscribed and sworn to before me this January 10th, 1898.
[SEAL.] GEO. L. WYLLYS,
Clerk of Supreme Court of the Territory of New Mexico.

100 And afterwards, to wit, there was filed in the office of the clerk of said supreme court a petition for an appeal and an assignment of errors, on the 11th day of January, 1898; which said petition for an appeal and an assignment of errors are in the words and figures following, to wit:

101 In the Supreme Court of the Territory of New Mexico, July Term, 1897.

RATON WATER WORKS COMPANY, Appellee,
vs.
TOWN OF RATON, Appellant. } No. 705.

Petition for Appeal and Assignment of Errors.

The Raton Water Works Company comes and prays an appeal from the decision, order, judgment, and decree of the supreme court of the Territory of New Mexico in said cause to the Supreme Court of the United States, and assigns and shows the following errors apparent upon the record of said cause:

1. The supreme court of New Mexico erred in reversing and in refusing to affirm the decree, judgment, decision, and order of the district court in and for the county of Colfax made and rendered in said cause.

2. The said supreme court erred in dismissing the bill of complaint of the said complainant company and in making the
102 order directing the said district court to dismiss the said bill of said complainant company.

3. The said supreme court erred in its finding, order, judgment, and decision that the board of trustees of the said town of Raton did not have the legal power to contract and bind the said town of Raton in the manner provided by ordinance No. 10 of said town of Raton, and thereby to bind the said town to pay out of the revenue derived by taxation for general purposes any sum in excess of the revenue to be derived from a levy of two mills on the dollar on its taxable property for each year.

4. The said supreme court erred in its finding, decision, and judgment that under and by reason of the provisions of an act of the legislative assembly of the Territory of New Mexico, contained in the Compiled Laws of 1884 of said Territory, section 1622, paragraph 71, the trustees of said town of Raton were limited, and were thereby inhibited from making and entering into said con-
103 tract and agreement embodied in said ordinance No. 10 of said town, and from thereby contracting to pay and from paying any greater sum of money than the sum derived by a special tax levy of two mills on the dollar during each fiscal year upon the property subject to taxation within the corporate limits of said town of Raton.

5. The said supreme court in its final decision, judgment, decree, and order in said cause committed other material errors apparent upon the record in said cause.

Wherefore, and for divers other sufficient reasons, the said Raton Water Works Company prays an appeal to the Supreme Court of the United States.

——— ———,
——— ———,
Solicitors for the Raton Water Works Company.

104 And afterwards, to wit, on the 11th day of January, A. D. 1898, in the supreme court of the Territory of New Mexico, the following, among other, proceedings were had, to wit:

RATON WATER WORKS COMPANY, Appellees,	}	No. 705. Appeal from
vs.		District Court for
TOWN OF RATON, Appellant.	}	Colfax County.

Now comes the said Raton Water Works Company, by its attorney, H. L. Warren, Esq., and here in open court prays the court to grant it an appeal from the judgment of this court heretofore rendered in this cause to the Supreme Court of the United States, and it appearing to the court that said Raton Water Works Company is by law entitled to such appeal as a matter of right—

It is ordered by the court that said Raton Water Works Company be, and it hereby is, granted an appeal from the judgment of this court heretofore rendered in this cause to the Supreme
105 Court of the United States; and it is further ordered that the amount of the appeal bond — be executed by the said Raton Water Works Company be, and is hereby, fixed at two hundred dollars.

106 And afterwards, to wit, on the said 11th day of January, A. D. 1898, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a statement of facts; which said statement of facts *are* in the words and figures following, to wit:

107 In the Supreme Court of the Territory of New Mexico, July Term, 1897.

RATON WATER WORKS COMPANY
vs.
THE TOWN OF RATON. } No. 705.

The supreme court of the Territory of New Mexico, having granted an appeal from the final judgment and decicion of said court in the said cause to The Raton Water Works Company, the appellee in said court in said cause, does hereby make and certify the following statement of the facts of the said case as shown by the record herein in the nature of a special verdict, and also the ruling of said court on the admission and rejection of evidence excepted to:

Statement of Facts.

This suit was duly commenced in the district court of the fourth judicial district within and for the county of Colfax, Territory of New Mexico, on the 26th day of August, 1895, by the complainant, The Raton Water Works Company, a corporation organized and existing under and in pursuance of the laws of the Territory of New Mexico, against The Town of Raton, a municipal corporation organized and existing under and in pursuance of the laws of the Territory of New Mexico, as defendant, upon and for the enforcement of a certain contract, the terms and conditions whereof were and are set forth and embodied in a certain public ordinance of the said town duly enacted and passed by the board of trustees thereof, the same being ordinance No. 10 of the said town, entitled "Ordinance No. 10, granting franchise to Raton Water Works Company to erect and maintain water works," published July 31, 1891, a copy whereof was duly filed with the said complainant's bill of
108 complaint in said cause and made part thereof, and which said ordinance, contract, and agreement was and is in words and figures as follows, to wit:

109 Whereas, the Raton Water Works Company, a corporation created and existing under and by virtue of the incorporation law of the Territory of New Mexico, has presented the board of trustees of the town of Raton a proposition for the construction of a system of water works, to be fully completed by July 1st, 1892, and,

Whereas, the health, comfort and general welfare of the citizens of this town, demand that we take prompt and efficient measures to secure an ample supply of water, especially in view of the fact that the present requirements of the railroad company are barely sufficient for its own purposes. Therefore,

Be it ordained by the board of trustees of the town of Raton:

SECTION 1. That the exclusive right of way and right and privilege to construct, operate and maintain water works in and near the town of Raton, New Mexico, for the purpose of supplying said town and the citizens thereof with good and wholesome water for domestic, manufacturing and sanitary purposes, as well as for the better protection of the property of the town from disasters by fires, is hereby granted to the Raton Water Works Company, a corporation duly organized and existing under and by virtue of the general incorporation laws of the Territory of New Mexico, its successors and assigns for the term of twenty-five years from the fifteenth day of July, A. D. 1891.

SEC. 2. And the said Raton Water Works Company, or its successors or assigns, are hereby granted exclusive right of way, as held by said town, for the period of twenty-five years from July fifteenth, 1891, to lay water pipes in any and all streets, alleys, lanes, roads and other highways and grounds dedicated or controlled, or which may be hereafter dedicated or controlled within the boundaries of the present or future corporate limits of the town, and to extend
110 said pipes, and to place, construct and erect hydrants, fountains, conduits, and such useful devises or structures as may be necessary for the successful operation of the said water-works system and the proper distribution of water in the town, and for this purpose said water company shall have the right to excavate streets, alleys, lanes, roads, pavements and sidewalks and other public grounds; provided, that there shall be no unreasonable obstruction of the streets or any public highway, and after the use of said streets and highways for the above purposes, they shall be restored as near as practicable to the same condition as the said company found the same on entering thereon.

SEC. 3. Said Raton Water Works Company shall lay main pipes along and through the streets of said town as the board of trustees may order substantially as follows:

From Apache avenue along Railroad avenue to Savage avenue.
From Apache avenue along Santa Fe avenue to Moulton avenue.
From Galisteo avenue along Topeka avenue to Moulton avenue.
From Mora avenue along Atchison avenue to Moulton avenue.
From Mora avenue along Tunnel avenue to Miembres avenue.
From Apache avenue along Raton avenue to Miembres avenue.

Also one main pipe for the accommodation of the people living in that portion of the town east of Railroad avenue.

And the board of trustees shall locate the twenty-five hydrants hereinafter provided for, along the mains aforesaid, taking into consideration those already located, and shall notify said water company before the said mains are laid, the places where such hydrants shall be erected.

111 SEC. 4. Said Raton Water Works Company, its successors or assigns, shall lay and extend pipes for carrying said water to any part of the aforesaid town when requested so to do by the board of trustees; provided, persons owning property along the line of such proposed extension shall take a reasonable amount of

water, and, provided, also, there shall be ordered set in each street or lane by said trustees, on which said company or its assigns shall be required to lay pipe, one hydrant for every eight hundred feet of main pipe so laid or extension ordered. It is understood, however, that no hydrants will be paid for by the town upon any of the extensions of the pipe not ordered by the trustees.

SEC. 5. The said company shall either construct a gravity line or use such engines and pumps as shall be capable in either case, of furnishing one million of gallons of water every twenty-four hours and when needed with a fire pressure of eighty pounds to the square inch on Fourth street in said town. All main pipes shall be of the best quality of cast or wrought iron or lead, such as is commonly used for that purpose, and all of said pipes to bear a 150-pounds hydraulic pressure. And the said water company shall have the said works completed so as to furnish water to the town by July 1, 1892. The said company shall commence the work of construction within sixty days from the date of the acceptance of this franchise by said company, and shall prosecute the said work as speedily as possible. In case said company shall fail to commence and continuously prosecute work as aforesaid, then this franchise shall become null and void and of no force and effect; provided, however, that if any injunction or other process of any court shall be
112 instituted against said company restraining them from prosecuting said work, the time consumed by said injunction or other process, shall not be computed in the sixty days aforesaid.

SEC. 6. If pumps are used, the said water company hereby agrees to construct a receiving reservoir of sufficient capacity to hold at least three million gallons of water, with a wall through the center thereof which will admit of one-half of said reservoir to be drained and cleaned when necessary, while the other can furnish the necessary water supply. Said reservoir to be executed to a depth of not less than six feet, with walls and bottom of stone and hydraulic cement, so as to be absolutely water-tight. And in case a gravity line is used a storage reservoir shall be constructed of sufficient capacity to hold at least ten million gallons of water.

SEC. 7. Said town shall have after the expiration of five years, the right to purchase the water works with all its rights, properties and franchises at a fair valuation, which shall be determined by three disinterested persons, non-residents of the town. One of said persons to be chosen by the board of trustees, one by the water company, one by the two thus selected. When this valuation shall be made as herein provided, the town shall pay the said valuation with ten per cent. added.

SEC. 8. The town authorities shall and will adopt and enforce all needful and requisite ordinances necessary to protect the water works and the owners thereof from fraud and imposition, and to prevent the unnecessary waste of water on the part of consumers, and the water works company shall have the power to make such rules and regulations for the conduct and management of its business not inconsistent with existing law and as they may deem necessary.

113 SEC. 9. The said town hereby exempts from all taxes for a term of twenty-five years, from and after the date specified in section 1, the property of said water works company of every name, nature and description which may be used by it in the conduct of its business.

SEC. 10. In consideration of the benefits that will accure to the town of Raton and its people, by the erection and operation of water works, and for the better protection of the town against fire, the town of Raton, does hereby agree and bind the said town to rent from the said Raton Water Works Company, or its assigns, for the aforesaid term of twenty-five years, twenty-five hydrants for the purpose of extinguishing fires, and purposes pertaining to the fire department, flushing sewers and irrigating public school grounds and parks, and the said town by the said board of trustees hereby agrees and binds the said town to pay to the said Raton Water Works Co mpany or its assigns, at the rate of one hundred dollars per year for each of said twenty-five hydrants. That the said board of trustees further agree and bind the said town of Raton to pay said Raton Water Works Company or its assigns the sum of seventy-five dollars per year for each hydrant for the next twenty-five additional hydrants that may be ordered set and erected by said board of trustees, and fifty dollars per year for each subsequent hydrant ordered set and erected thereafter by said board of trustees; provided, the said Raton Water Works Company, or its assigns shall erect and maintain, at all times, in good repair, double-discharge fire-hydran's with four-inch connections to the main pipe and two and one-half inch hose connections with each hydraut.

114 SEC. 11. That the said town of Raton shall pay to the said Raton Water Works Company or its assigns, as follows, to wit: on the first day of January and July of each and every year one-half of the aforesaid money and for all additional hydrants thereafter in like manner on the 1st day of January and July as aforesaid. The said town agrees to levy and collect a tax sufficient for the purpose of making said semi-annual payments for each and every one of the twenty-five years aforesaid, and in default of making said payment the said town shall pay interest on said semi-annual payments at the rate of ten per cent. per annum.

SEC. 12. In the event of the shortage of water, either by reason of drouth, accidents, or other causes over which said water company can have no control, the water shall be first supplied, to the citizens for domestic use and to the railroad company for its purposes; provided, however, that if said company shall neglect or fail for any reason within its control, to furnish a supply of wholesome water as herein provided, the trustees shall have power *have power* to force said company to do so by fines not less than three hundred nor more than one thousand dollars for the first offense, and if such failure shall continue for a period of thirty days, said board of trustees shall have power to revoke this franchise.

SEC. 13. For the government of the water works company and for the protection and government of the citizens, the water rates to

consumers during the continuance of this franchise shall not exceed the following monthly tariff rates, namely:

115	Per month.
Barber shop, first chair	$1.50
Each additional chair	.75
General stores, dry goods, groceries, etc	2.00
Private bath-tubs, each	.75
Hotel or boarding-house bath-tubs	1.50
Public bath-tubs, each	2.50
Boarding-houses, for each room	.30
Cows, each	.25
Drug stores	3.50
Forges, each	1.25
Horse, private	.50
Horses, livery stable, for each stall	.40
Horse, other than above	.40
Hotel, each room	.50
Offices and banks	1.50
Photograph gallery	2.00
Residences, 4 rooms or less	1.50
Additional rooms	.25
Public lodging-houses, each room	.40
Restaurants, all night	10.00
Restaurants, 16 hours	6.00
Saloon, all night	6.00
Saloon, 16 hours	5.00
School, for each 25 scholars	1.50
Plastering, for 100 yards	.60
Brick-work, per 1,000 laid	.15
Urinal basins, each	1.50
Water-closet, private house	.75
Water-closet, hotel	1.50

For irrigating lawns, gardens and lots, 25 cents per annum per front foot.

For uses not otherwise specified, special rates may be made by said water company and collected. The company shall have the right to place a meter in the pipe of any customer and charge the tariff price hereinafter named, and the customer shall have the right to demand and receive such meter and pay according to said meter measurement as follows:

200 gallons per day or less	5 cts. per 100 gallons.
200 to 1,000 gallons per day or less	4½ cts.
1,000 to 2,000 " " "	4 cts.
2,000 to 4,000 " " "	3½ cts.
4,000 to 6,000 " " and upwards	3 cts.

116 In case either party shall elect that meters shall be set, the same shall be paid for by the party commanding the same.

SEC. 14. It shall be unlawful for any person, except such as are

authorized by said water company, or by the mayor or board of trustees of said town, with the approval of said water company, to in any manner disturb or meddle with any main, hydrant, connection, service pipe, fountain, reservoir, well, building, machinery, or any other property of or belonging to said company or the town of Raton, or by any means pollute or defile any reservoir, well, spring, source of water supply, or any hydrant, fountain or receptacle receiving said water from said water works. Any person violating any of the provisions of this section shall, on conviction before any justice of the peace resident of said town, be punished by a fine of not less than ten dollars nor more than two hundred dollars, or imprisonment in the county jail or town prison for a period of not less than thirty days or more than three months, or both said fine and imprisonment, in the discretion of the court.

SEC. 15. Within thirty days after the granting of this franchise, the said Raton Water Works Company shall file with the town recorder of said town its acceptance, in writing, of all the terms, provisions and conditions of this ordinance, which acceptance, before filing, shall be duly acknowledged before some officer authorized to take acknowledgments, and the same shall be recorded in the book of ordinances of said town, and safely kept by the said town recorder; provided, the same shall be ratified by a vote of the people of this town as is hereinafter provided.

117 SECTION 16. An election for the ratification or rejection of this ordinance shall be held in the town of Raton, at the hose-house on the 1st day of August, A. D. 1891, and the following-named persons shall act as judges and clerks of said election: Ray Harvey, C. D. Stevens, Francisco Salazar, judges. Antonio Pinson and W. D. Penderton, clerks.

The ballot shall be in the form prescribed by statute, and said ballot shall read:

"For water-works ordinance, as passed by town trustees July 20, 1891."

"Against water-works ordinance, as passed by town trustees July 20, 1891."

WILLIAM TINDALL, *Mayor.*

CHAS. A. FOX, *Recorder.*

Published July 24, 1891.

118 It was further alleged in said bill and this court finds and certifies that the said ordinance, contract, and agreement was duly ratified and confirmed at an election held in the said town of Raton on the first day of August, 1891, by a vote of the duly qualified electors of the said town, in pursuance of the requirements of law in relation thereto, and that the said ordinance, contract, and agreement became and was and remained valid and operative and in full force and effect.

It was further alleged in said bill and this court certifies that within thirty days thereafter the complainant, The Raton Water Works Company, did file with the town recorder of the said town of Raton its acceptance in writing of all the terms, provisions, and

conditions of the said ordinance, contract, and agreement, and that all the requirements of law and of said ordinance, contract, and agreement were fully and duly complied with by the said complainant corporation, and that the same became and was and remained in all respects valid and obligatory upon both of said parties thereto.

It was further alleged in the said bill and this court certifies that in and by the said contract and agreement so embodied in said ordinance No. 10 it was contracted and agreed that the said complainant company should lay main pipes along and through the streets in said town of Raton as the board of trustees might order, substantially as follows: From Apache avenue along Railroad avenue to Savage avenue; from Apache avenue along Santa Fe avenue to Moulton avenue; from Galisteo avenue along Topeka avenue to Moulton avenue; from Mora avenue along Atchison avenue to Moulton avenue; from Mora avenue along Tunnel
119 avenue to Miembres avenue; from Apache avenue along Raton avenue to Miembres avenue; also one main pipe for the accommodation of the people living in that portion of the town east of railroad avenue.

And that the board of trustees of said town should locate twenty-five hydrants provided for by said board along the mains aforesaid, taking into consideration those already located, and should notify said complainant company before said mains should be layed of the places where such hydrants should be erected.

It was further alleged in said bill and this court certifies that it was further provided and contracted in and by section 4 of said contract and ordinance No. 10 that said complainant company should lay and extend pipes for carrying said water to any part of the aforesaid town when requested so to do by the board of trustees of said town.

It was further alleged in said bill and this court further certifies that in and by the said contract and ordinance the said defendant, The Town of Raton, contracted and agreed with the complainant company that the said defendant, The Town of Raton, should and thereby did rent from the said complainant company for the term of twenty-five years thereafter twenty-five hydrants for the purposes of extinguishing fire and for purposes pertaining to the fire department of the said town, flushing sewers, and the irrigating of public school grounds and parks, and the said town of Raton by its board of trustees did thereby agree and bind the said town to pay to said complainant company at the rate of one hundred dollars per year for each of said twenty-five hydrants.

It was further alleged in said bill of complaint and this court does certify that in and by said contract and ordinance No.
120 10 the said defendant, The Town of Raton, did further contract and agree to pay to said complainant company seventy-five dollars per year for each hydrant for the next twenty-five additional hydrants that should be ordered set and erected by the board of trustees of said defendant town, and fifty dollars per year for each

subsequent hydrant ordered set and erected thereafter by said board of trustees.

It was further alleged in said bill of complaint and this court further certifies that in and by said ordinance and contract that said defendant, Town of Raton, should and would pay to said complainant company as follows, to wit: On the first day of January and July of each and every year one-half of the amount of said rental for said hydrants so as aforesaid erected and maintained by said complainant company at the said annual rental thereof before mentioned, and at the said rates and periods for all such additional hydrants as might thereafter be erected and maintained by said complainant company under and in pursuance of said contract and agreement.

It was further alleged in said bill and the court does certify that the said complainant company has in all respects fully perfformed and complied with all the terms and conditions of the said ordinance, contract, and agreement on its part, and that after making of the same the said complainant company did lay mains in and upon the following streets as provided for in said ordinance, contract, and agreement, to wit:

From Apache avenue along Railroad avenue to Savage avenue.

From Apache avenue along Santa Fe avenue to Moulton avenue.

From Galisteo avenue along Topeka avenue to Moulton avenue.

121 From Mora avenue along Atchison avenue to Moulton avenue.

From Mora avenue along Tunnel avenue to Miembres avenue, and from Apache avenue along Raton avenue to Miembres avenue; also a main pipe along the principal street on east side of the railroad in said town.

It was further alleged in said bill and the court does certify that on the 9th day of May, 1892, the board of trustees of said town did issue an order under the terms and conditions of said ordinance and contract and did thereby order and contract a fire hydrant or plug should be set by said complainant company in addition to the fire hydrants or plugs theretofore set on the southeast corner of the following blocks in the Maxwell north addition to said town, to wit:

Blocks 1, 2, 3, 4, 5, 6, 7, 10, 11, and 13; and of the following blocks in the town-site addition to said town, to wit, blocks 1, 2, 3, 4, 8, 7, 6, 5, 44, 9, 10, 11, 12, 13, 18, 17, 16, 15, 14, 21, 22, 25, 24, 32, and 33, and on the following blocks in Maxwell west addition to said town, to wit, blocks M & No. 1.

It was further alleged in said bill and the court does certify that on the 20th day of June, 1892, the said defendant corporation by the board of trustees thereof did order and contract with said complainant to extend the first street or Railroad Avenue main to the Rio Grande avenue and the second street or Santa Fe Avenue main to the middle of block No. 30, and that a fire-hydrant should be set at the southeast corner of block 27.

It is further alleged in said bill and the court does certify that all of the said order and directions so made by said defendant cor-

poration were fully complied with and performed by said complainant company.

122 It is further alleged in said bill and the court does certify that, in pursuance of the condition of said ordinance, contract, and agreement, thirteen hundred feet of water main were laid by said complainant company in said streets in that portion of said town of Raton lying east of the Atchison, Topeka & Santa Fe railroad in said town, on which there were set by said complainant two hydrants, and there were set in all forty-four hydrants by said complainant under and in pursuance of said ordinance and contract.

It was further alleged in said bill and the court does certify that the board of trustees of the said defendant, Town of Raton, did appoint a committee to investigate the plant of said complainant, and that said committee did on October 15, 1892, make a written report to the said board of trustees that the said plant had been constructed practically in accordance with said ordinance and contract, and did recommend that the same should be accepted by the said defendant corporation under the conditions of said ordinance and contract, and that the said water works, mains, pipes, fire-plugs, hydrants, and plant so constructed and laid by the said complainant company were duly accepted by the said defendant, Town of Raton.

It was further alleged in said bill and the court does certify that the said complainant company did construct the said water works and plant within the time and in accordance with the terms of said ordinance, contract, and agreement at a large expenditure of money, to wit, one hundred and fifteen thousand dollars, and that the said complainant company did construct a reservoir with a capacity of forty-two million gallons of water and did lay and construct six and seven-tenths miles of water mains of eight-inch capacity into said town of Raton in addition to the said mains laid in the said

123 streets and did have the same completed and in operation in supplying water to the said defendant, Town of Raton, and its inhabitants within the time prescribed by said ordinance, contract, and agreement, and has in all things strictly performed, complied with, and carried out the terms of said ordinance and agreement, and did prior to January 1st, 1893, place, construct, and erect forty-four hydrants, and has ever since maintained the same for the use of said defendant, Town of Raton, and that the said defendant town has ever since the last-mentioned date been and now is in possession, occupancy, and use of the same and by virtue of said ordinance and contract.

It was further alleged in said bill and the court does certify that prior to the first day of April, 1895, the fiscal year of said defendant town commenced on the first day of April, in each year, in pursuance of law, and that it was the duty of the board of trustees of said town, within the last quarter of each fiscal year, to pass an ordinance to be termed "Annual appropriation bill" for the next ensuing year, and thereby to appropriate such sum or sums of money as was necessary to defray the expenses and liability of said defendant town, *an* and to include therein the amount necessary to make the semi-annual payment to the said complainant company for the

rental and use of said hydrants, in pursuance of said ordinance and contract.

It was further alleged in said bill and the court does certify that in pursuance of said duty so imposed by law the board of trustees of the said defendant, Town of Raton, did on, to wit, on March 18, 1895, and within the last quarter of said fiscal year, enact and pass an ordinance entitled "An ordinance relating to tax levy and appropriations for the years 1895 and 1896," and did thereby appropriate out of the moneys and revenues covered into the
124 treasury of the said defendant town or to be collected and paid into the same from any and all sources during the fiscal year commencing on the first day of April, 1895, derived from taxes, license, fines, fees, and all other sources, the sum of four thousand seven hundred and thirty-five dollars and fifteen cents for the payment of the amount then due and payable to said complainant under and by virtue of said ordinance and contract, and did thereby further appropriate the sum of three thousand nine hundred and twenty-five dollars for the payment of said complainant for the hydrants so set and provided by said complainant as aforesaid for the year commencing January 1st, 1895, to wit, four thousand seven hundred and thirty-five dollars and fifteen cents, and that the board of trustees of said defendant town did issue to the said complainant warrants of said town as follows, to wit: Warrant No. 536, dated January 1st, 1895, due six months after date, for the sum of six hundred and nine dollars and thirty-seven cents; warrant No. 537, dated January 1st, 1895, due six months after date, for the sum of five hundred dollars; warrant No. 538, dated January 1st, 1895, due October 1st, 1895, for the sum of six hundred and nine dollars and thirty-eight cents; warrant No. 539, dated January 1, 1895, due October 1st, 1895, for the sum of five hundred dollars; warrant No. 540, dated January 1st, 1895, due January 1st, 1896, for the sum of six hundred and nine dollars and thirty-seven cents; warrant No. 541, dated January 1st, 1895, due January 1, 1896, for the sum of five hundred dollars; warrant No. 542, dated January 1, 1895, due April 1st, 1896, for the sum of six hundred and nine dollars and thirty-eight cents; warrant No. 543, dated January 1, 1895, due April 1st, 1896, for the sum of five hundred dollars; all of said warrants bearing interest at the rate
125 of ten per cent. from date; warrant No. 544, dated March 18, 1895, payable on demand for the sum of two hundred and ninety-seven dollars and sixty-five cents, for the interest due on account up to January 1st, 1895; each of which said warrants was duly drawn on the treasurer of the town of Raton, signed by the mayor, and countersigned by the recorder of said town.

It is further alleged in said bill and the court does certify that in pursuance of law it was the duty of the treasurer of said town to have and keep in his office a book to be called the "Register of Town Orders," wherein should be entered and set down at the date of the presentation thereof each of said warrants and to pay out of the funds of said town in his hands for disbursements the amount

of each of said warrants in the order in which the same were presented to him for payment.

It is further alleged in said bill and the court does certify that, although so requested so to do, the defendant prior to the commencement of this suit had refused and still refuses to perform the said agreement upon its part and to pay to the said complainant the said semi-annual rental for hydrants so set and provided by said complainant company at the said periods when the same became due and as the same would hereafter accrue in pursuance of said ordinance and contract, and that the said complainant has fully performed its said agreement upon its part, and the said defendant has been and now is in possession, use, and enjoyment of the said water plant under its contract.

It is further alleged in said bill and the court does certify that in addition to the amount of said rental payable to the said complainant on or prior to January 1st, 1895, as hereinbefore stated, there became due to the said complainant company the sum of one thousand nine hundred and sixty-two dollars and fifty cents; that
126 the said defendant has refuses and still refuses to pay the said amount heretofore accrued and payable to the said complainant company, and has refused and still refuses to pay the said several amounts which have heretofore accrued and which will hereafter accrue to said complainant company.

And the court does further certify there was filed in the said clerk's office the answer of the respondent admitting the allegations of the complainant's bill, and for a further answer allege the following facts, which the court also certify: That under the Compiled Laws of 1884, section 1622, paragraph 71, the board of trustees of the defendant town were required to levy each year and cause to be collected a special tax sufficient to pay off the water rent agreed to be paid to complainant, provided that the said special tax shall not exceed the sum of two mills on the dollar for any one year, defendants also showing that practically its entire revenue is derived from tax levy, it is thus limited in its payments for water rents to the proceeds of the two-mill tax levied on each dollar of taxable property.

It is further alleged in said answer and the court does certify that for the year 1891 the total assessment for town purposes as certified by the county assessor was six hundred and twenty-eight thousand nine hundred and forty dollars; that the town tax rates for said year was five mills on the dollar, making the total possible tax yield three thousand one hundred and nineteen dollars and seventy cents, and gaving an actual tax yield of two thousand eighty-nine dollars and fifty-two cents for the year 1892; the total assessment was six hundred and seventy-three thousand nine hundred dollars, the tax rate 8 mills on the dollar, and the actual amount of taxes collected three thousand two hundred and four dollars and thirty-nine
127 cents; for the year 1893 the total assessment was eight hundred and seven thousand two hundred and thirty dollars, the tax rate was six mills, and the taxes actually collected amounted to two thousand seven hundred and eighteen dollars and eighty-

three cents; for the year 1894 the total assessment was six hundred and fifty thousand six hundred and twenty dollars, the tax rate was ten mills on each dollar of taxable property, and the amount of taxes actually collected was three thousand six hundred and sixteen dollars and fifty-two cents; that under the law the defendant, The Town of Raton, *it* paid complainant each year the full proceeds of two-mills tax levy authorized by law for water rent; that in 1892 it payed complainant the sum of nineteen hundred and twenty-five dollars; in 1893, the sum of eighteen hundred dollars; in 1894, the sum of sixteen hundred dollars, and for 1895 it has under ordinance "No. F," hereinbefore referred to, levied said special tax of two mills on each dollar of taxable property to meet complainant's water rent; that under the law the total amount appropriated for any purpose for any fiscal year cannot exceed the probable amount of revenue for that year, and that its appropriation of fifteen hundred dollars in said ordinance "No. F" for complainant's benefit for the year 1895 is a full compliance for the complainant's legal demand under said contract marked Complainant's Exhibit "A," as likewise amounts paid for in 1892, 1893, and 1894 are in full of all that complainant can in equity and good conscience demand under its contract with the defendant. Defendant, further answering, shows that said alleged semi-annual rental of one thousand nine hundred and sixty-two dollars and fifty cents claimed by complainant is far in excess of the amount derivable from a two-mills tax levy on the assessed value of property subject to taxation within said town of Raton, and that sai- rental, so far as it is
128 in excess of the proceeds of said tax levy, is illegal, inoperative, and void.

It is further alleged in said answer and the court does certify that said ordinance marked Exhibit "A," so far as the same imposes upon the defendant the obligation to pay complainant an annual sum greater than the proceeds of a two-mill tax levy or to impose a tax levy greater than said rate, was and is null, void, and inoperative, the same having been made and entered into by defendant's trustees in violation of law and in excess of powers conferred upon them by the statutes of New Mexico.

It is further alleged in said answer and the court does certify that said warrants issued to complainants, as set forth in complainant's bill, were and are null and void, having been issued by the defendant's trustees in excess of the amount derived from a two-mills levy on each dollar of taxable property thus and having thus been issued contrary to law and in excess of the authority conferred by law upon said trustees.

It is further alleged in said answer and the court does certify that the reasons just mentioned, ordinance number 59, referred to by complainant in Exhibit "E," was and is void and inoperative, and that ordinance number 64, referred to by complainant in Exhibit "F," was and is valid and in full force.

The court doth further find and certify that no evidence was offered or introduced by either of said parties in said cause in said district court or in said supreme court, and that said cause, by

stipulation of the parties, was heard and determined in and by the said district court upon the said bill of complaint of said Raton Water Works Company and the answer thereto of the Town of Raton, and that the facts hereinbefore stated and certified by
129 this court are found solely upon and from said bill and answer and exhibits therewith filed, as the same truly appear in the transcript of the record in said cause, duly filed in the said supreme court, upon the appeal taken thereto by The town of Raton from the final decree, findings of fact, judgment, and decision rendered and made by the said district court in favor of said Raton Water Works Company, decreeing the specific performance by the town of Raton of said ordinance number 10, contract, and agreement aforesaid, and which said final decree, findings of fact, judgment, and decision of said district court were and are in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, }
County of Colfax. }

In the District Court, Fourth Judicial District.

RATON WATER WORKS COMPANY }
vs. } No. 1888. Specific Performance.
TOWN OF RATON. }

This cause having been heretofore set down for hearing upon the bill of complaint of the said complainant and the answer of the said defendant in pursuance of the stipulations of the parties hereto, and the said cause now coming on for hearing upon the said bill and answer, *and* the court, being now fully informed and advised in the premises, doth find that the said defendant, The Town of Raton, *defendant*, at the time of the filing of said bill was and now is a municipal corporation organized and existing under and in pursuance of the laws of this Territory, and that the said defendant corporation did heretofore, to wit, on July 24th, 1891, under and in pursuance of the laws of said Territory, make and enter into a certain contract and agreement with the said complainant, The Raton Water Works Company, a corporation organized and existing under and by virtue of the laws of this Territory, the terms and conditions whereof were and are set forth and embodied in a certain public ordinance of the said town duly enacted and passed by the board of trustees thereof, the same being ordinance No. 10 of the said town, entitled "Ordinance No. 10, granting franchise to Raton Water Works Company to erect and maintain water works," published July 31, 1891, and which said ordinance, contract, and agreement was and is in words and figures as follows, to wit:

130 Whereas, the Raton Water Works Company, a corporation created and existing under and by virtue of the incorporation law of the Territory of New Mexico, has presented the board of trustees of the town of Raton a proposition for the construction

of a system of water works, to be fully completed by July 1st, 1892, and,

Whereas, the health, comfort and general welfare of the citizens of this town, demand that we take prompt and efficient measures to secure an ample supply of water, especially in view of the fact that the present requirements of the railroad company are barely sufficient for its own purposes. Therefore,

Be it ordained by the board of trustees of the town of Raton:

SECTION 1. That the exclusive right of way and right and privilege to construct, operate and maintain water works in and near the town of Raton, New Mexico, for the purpose of supplying said town and the citizens thereof with good and wholesome water for domestic, manufacturing and sanitary purposes, as well as for the better protection of the property of the town from disasters by fires, is hereby granted to the Raton Water Works Company, a corporation duly organized and existing under and by virtue of the general incorporation laws of the Territory of New Mexico, its successors and assigns for the term of twenty-five years from the fifteenth day of July, A. D. 1891.

SEC. 2. And the said Raton Water Works Company, or its successors or assigns, are hereby granted exclusive right of way, as held by said town for the period of twenty-five years from July fifteenth, 1891, to lay water pipes in any and all streets, alleys, lanes, roads and other highways and grounds dedicated or controlled, or which may be hereafter dedicated or controlled within the boundaries of the present or future corporate limits of the town, and to extend said pipes, and to place, construct and erect hydrants,
131 fountains, conduits, and such *place, construct and erect hydrants, fountains, conduits, and such* useful devises or structures as may be necessary for the successful operation of the said water-works system and the proper distribution of water in the town, and for this purpose said water company shall have the right to excavate streets, alleys, lanes, roads, pavements and sidewalks and other public grounds; Provided, that there shall be no unreasonable obstruction of the streets or any public highway, and after the use of said streets and highways for the above purposes, they shall be restored as near as practicable to the same condition as the said company found the same on entering thereon.

SEC. 3. Said Raton Water Works Company shall lay main pipes along and through the streets of said town as the board of trustees may order substantially as follows:

From Apache avenue along Railroad avenue to Savage avenue.

From Apache avenue along Santa Fe avenue to Moulton avenue.

From Calisteo avenue along Topeka avenue to Moulton avenue.

From Mora avenue along Atchison avenue to Moulton avenue.

From Mora avenue along Tunnel avenue to Miembres avenue.

From Apache avenue along Raton avenue to Miembres avenue.

Also one main pipe for the accom odation of the people living in that portion of the town east of Railroad avenue.

And the board of trustees shall locate the twenty-five hydrants hereinafter provided for, along the mains aforesaid, taking into con-

sideration those already located and shall notify said water company before the said mains are laid, the places where such hydrants shall be erected.

132 SEC. 4. Said Raton Water Works Company, its successors or assigns, shall lay and extend pipes for carrying said water to any part of the aforesaid town when requested so to do by the board of trustees;

Provided, persons owning property along the line of such proposed extension shall take a reasonable amount of water, and,

Provided, also, there shall be ordered set in each street or lane by said trustees, on which said company or its assigns shall be required to lay pipe, one hydrant for every eight hundred feet of main pipe so laid or extension ordered. It is understood, however, that no hydrants will be paid for by the town upon any of the extensions of the pipe not ordered by the trustees.

SEC. 5. The said company shall either construct a gravity line or use such engines and pumps as shall be capable in either case, of furnishing one million of gallons of water every twenty-four hours and when needed with a fire pressure of eighty pounds to the square inch on Fourth street in said town. All main pipes shall be of the best quality of cast or wrought iron or lead, such as is commonly used for that purpose, and all of said pipes to bear a 150 pounds hydraulic pressure. And the said water company shall have the said works completed so as to furnish water to the town by July 1, 1892. The said company shall commence the work of construction within sixty days from the date of the acceptance of this franchise by said company, and shall prosecute the said work as speedily as possible. In case said company shall fail to commence and continuously prosecute work as aforesaid, then this franchise shall become null and void and of no force and effect; Provided, however, that if any injunction or other process of any court shall be

133 instituted against said company restraining them from prosecuting said work, the time consumed by said injunction or other process, shall not be computed in the sixty days aforesaid.

SEC. 6. If pumps are used, the said water company shereby agrees to construct a receiving reservoir of sufficient capacity to hold at least three million gallons of water, with a wall through the center thereof which will admit of one-half of said reservoir to be drained and cleaned when necessary, while the other can furnish the necessary water supply. Said reservoir to be executed to a depth of not less than six feet, with walls and bottom of stone and hydraulic cement, so as to be absolutely water-tight. And in case a gravity line is used a storage reservoir shall be constructed of sufficient capacity to hold at least ten million gallons of water.

SEC. 7. Said town shall have after the expiration of five years, the right to purchase the water works with all its rights, properties and franchises at a fair valuation, which shall be determined by three disinterested persons, non-residents of the town. One of said persons to be chosen by the board of trustees, one by the water company, one by the two thus selected. When this valuation shall be

made as herein provided, the town shall pay the said valuation with ten per cent. added.

SEC. 8. The town authorities shall and will adopt and enforce all needful and requisite ordinances necessary to protect the water works and the owners thereof from fraud and imposition, and to prevent the unnecessary waste of water on the part of consumers, and the water works company shall have the power to make such rules and regulations for the conduct and management of its business not inconsistent with existing laws and as they may deem necessary.

134 SEC. 9. The said town hereby exempts from all taxes for a term of twenty-five years, from and after the date specified in section 1, the property of said water works company of every name, nature and description which may be used by it in the conduct of its business.

SEC. 10. In consideration of the benefits that will accrue to the town of Raton and its people, by the erection and operation of water works, and for the better protection of the town against fire, the town of Raton, does hereby agree and bind the said town to rent from the said Raton Water Works Company, or its assigns, for the aforesaid term of twenty-five years, twenty-five hydrants for the purpose of extinguishin- fires, and purposes pertaining to the fire department, flushing sewers and irrigating public school grounds and parks, and the said town by the said board of trustees hereby agrees and binds the said town to pay to the said Raton Water Works Company, or its assigns, at the rate of one hundred dollars per year for each of said twenty-five hydrants. That the said board of trustees further agree and bind the said town of Raton to pay said Raton Water Works Company or its assigns the sum of seventy-five dollars per year for each hydrant for the next twenty-five additional hydrants that may be ordered set and erected by said board of trustees, and fifty dollars per year for each subsequent hydrant ordered set and erected thereafter by said board of trustees; Provided, the said Raton Water Works Company, or its assigns shall erect and maintain, at all times, in good repair, double-discharge fire-hydrants with four-inch connections to the main pipe and two and one-half inch hose connections with each hydrant.

135 SEC. 11. That the said town of Raton shall pay to the said Raton Water Works Company or its assigns, as follows, to wit: On the first day of January and July of each and every year one-half of the aforesaid money and for all additional hydrants thereafter in like manner on the 1st day of January and July as aforesaid. The said town agrees to levy and collect a tax sufficient for the purpose of making said semi-annual payments for each and every one of the twenty-five years aforesaid, and in default of making said payment the said town shall pay interest on said semi-annual payments at the rate of ten per cent. per annum.

SEC. 12. In the event of the shortage of water, either by reason of drouth, accidents, or other causes over which said water company can have no control, the water shall be first supplied, to the citizens for domestic use and to the railroad company for its purposes;

Provided, however, that if said company shall neglect or fail for any reason within its control, to furnish a supply of wholesome water as herein provided, the trustees shall have power *have power* to force said company to do so by fines not less than three hundred nor more than one thousand dollars for the first offense, and if such failure shall continue for a period of thirty days, said board of trustees shall have power to revoke this franchise.

SEC. 13. For the government of the water works company and for the protection and government of the citizens, the water rates to consumers during the continuance of this franchise shall not exceed the following monthly tariff rates, namely:

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	Per month.
Barber shop, first chair	$1.50
Each additional chair	.75
General stores, dry goods, groceries, etc	2.00
Private bath-tubs, each	.75
Hotel or boarding-house bath-tubs	1.50
Public bath-tubs, each	2.50
Boarding-houses, for each room	.30
Cows, each	.25
Drug stores	3.50
Forges, each	1.25
Horse, private	.50
Horses, livery stable, for each stall	.40
Horse, other than above	.40
Hotel, each room	.50
Offices and banks	1.50
Photograph gallery	2.00
Residences, 4 rooms or less	1.50
Additional rooms	.25
Public lodging-houses, each room	.40
Restaurants, all night	10.00
Restaurants, 16 hours	6.00
Saloon, all night	6.00
Saloon, 16 hours	5.00
School, for each 25 scholars	1.50
Plastering, for 100 yards	.60
Brick-work, per 1,000 laid	.15
Urinal basins, each	1.50
Water-closet, private house	.75
Water-closet, hotel	1.50

For irrigating lawns, gardens, and lots, twenty-five cents per annum per front foot.

For uses not otherwise specified, special rates may be made by said water company and collected. The company shall have the right to place a meter in the pipe of any customer and charge the tariff price hereinafter named, and the customer shall have the right to demand and receive such meter and pay according to said meter measurement as follows:

200 gallons per day or less, 5 cts. per 100 gallons.
200 to 1,000 gallons per day or less, 4½ cts.
1,000 to 2,000 " " " " " 4 cts.
2,000 to 4,000 " " " " " 3½ cts.
4,000 to 6,000 " " " and upwards, 3 cts.

137 In case either party shall elect that meters shall be set, the same shall be paid for by the party commanding the same.

SECTION 14. It shall be unlawful for any person except such as are authorized by said water company, or by the mayor or board of trustees of said town, with the approval of said water company, to in any manner disturb or meddle with any main, hydrant, connection, service-pipe fountain, reservoir, well, building, machinery or any other property of or belonging to said company or the town of Raton, or by any means pollute or defile any reservoir, well, spring, source of water supply, or any hydrant, fountain or receptácle, receiving said water from said water works. Any person violating any of the provisions of this section, shall, on conviction before any justice of the peace, resident of said town, be punished by a fine of not less than ten dollars nor more than two hundred dollars, or imprisonment in the county jail or town prison for a period of not less than thirty days or more than three months, or both said fine and imprisonment in the discretion of the court.

SECTION 15. Within thirty days after the granting of this franchise, the said Raton Water Works Company shall file with the town recorder of said town, its acceptance in writing, of all the terms, provisions, and conditions of this ordinance, which acceptance before filing shall be duly acknowledged before some officer authorized to take acknowledgments, and the same shall be recorded in the book of ordinances of said town, and safely kept by the said town recorder: Provided, the same shall be ratified by a vote of the people of this town as is hereinafter provided.

138 SECTION 16. An election for the ratification or rejection of this ordinance shall be held in the town of Raton, at the hose-house on the 1st day of August, A. D. 1891, and the following-named persons shall act as judges and clerks of said election: Ray Harvey, C. D. Stevens, Francisco Salazar, judges. Antonio Pinzon and W. D. Penderton, clerks.

The ballot shall be in the form prescribed by statute, and said ballot shall read:

"For water-works ordinance as passed by town trustees, July 20, 1891."

"Against water-works ordinance as passed by town trustees July 20, 1891."

WILLIAM TINDALL, *Mayor.*

CHAS. A. FOX, *Recorder.*

Published July 24, 1891.

139 And the court doth further find that the said ordinance contract, and agreement was duly ratified and confirmed and an election held in the said town of Raton on the first day of

August, 1891, by a vote of the duly qualified electors of said town in pursuance of the requirements of law in relation thereto, and that the said ordinance, contract, and agreement became and was, and now is valid and operative and in full force and effect.

And the court doth further find that within thirty days thereafter said complainant did file with the town recorder of the said town of Raton its acceptance in writing of all the terms, provisions, and conditions of the said ordinance, which said acceptance was duly acknowledged by said defendant corporation, and that all the requirements of law and of said ordinance, contract, and agreement were fully and duly complied with by the said complainant corporation, and that the said ordinance, contract, and agreement became and was and now is in all respects valid and obligatory upon both of said parties thereto.

And the court doth further find that in and by the said contract and agreement so embodied in the said ordinance it was contracted and agreed that the said complainant corporation should lay main pipes along and through the streets of said town as the board of trustees thereof might order, substantially as follows:

From Apache avenue along Railroad avenue to Savage avenue.
From Apache avenue along Santa Fe avenue to Moulton avenue.
From Galisteo avenue along Topeka avenue to Moulton avenue.
From Mora avenue along Atchison avenue to Moulton avenue.
From Mora avenue along Tunnel avenue to Miembres avenue.
From Apache avenue along Raton avenue to Miembres avenue.

Also one main pipe for the accommodation of the people living in that portion of the town east of Railroad avenue.

And the board of trustees shall locate the 25 hydrants hereinafter provided for along the mains aforesaid, taking into consideration those already located, and shall notify said water company before said main are laid — the places where such hydrants shall be erected.

And it was thereby further provided that: Section 4. "Said Raton Water Works Company, its successors or assigns shall lay and extend pipes for carrying said water to any part of the aforesaid town when requested so to do by the board of trustees: Provided, persons owning property along the line of such proposed extensions, shall take a reasonable amount of water, and provided, also, that there shall be ordered set in each street or lane by said trustees, on which said company or its assigns, shall be required to lay pipe, one hydrant for every (800) eight hundred feet of main pipe so laid or extension ordered. It is understood, however, that no hydrants will be paid for by the town upon any of the extensions of the pipes not ordered by the trustees."

And the court doth further find that in and by said ordinance, contract, and agreement it was further contracted and agreed that in consideration of the benefits that would accrue to the said town of Raton and its people by the erection and operation of said water works, and for the better protection of the said town against fires, the said town of Raton did thereby agree and bind the said town to rent from the said Raton Water Works Company or its assigns, for

the term of twenty-five years thereafter, twenty-five hydrants for the purpose of extinguishing fires, and for purposes pertaining
141 to the fire department of said town, flushing sewers and irrigating public school grounds and parks, and the said town, by the board of trustees thereof, did thereby agree and bind the said town to pay to the complainant or its assigns at the rate of one hundred dollars per year for each of said twenty-five hydrants.

And the said town did thereby further contract and agree to pay to the complainant or its assigns the sum of seventy-five dollars per year for each hydrant for the next twenty-five additional hydrants that might be ordered set and erected by the board of trustees of said town, and fifty dollars per year for each subsequent hydrant ordered set and erected thereafter by said board of trustees; and it was further thereby provided that the complainant should erect and maintain at all times, in good repair, double-discharge fire-hydrants, with four-inch connections to the main pipe and two and one-half inch hose connection with each hydrant.

And the court doth further find that in and by said ordinance, contract, and agreement it was further contracted and agreed that said defendant corporation should and would pay to the said complainant as follows, to wit:

On the first day of January and July *and* every year one-half of the amount of said rental for said hydrants so as aforesaid erected and maintained by the said complainant at the annual rental therefor, hereinbefore mentioned, and at the said rates and periods for all such additional hydrants as might thereafter be erected and maintained by the said complainant under and in pursuance of said ordinance, contract, and agreement.

142 And the court doth further find that the said complainant company has in all respects fully performed and complied with all the terms and conditions of said ordinance, contract, and agreement upon its part, and that after the making of the same the said complainant company did lay mains in and upon the following streets as provided for in and by said ordinance, contract, and agreement, to wit:

From Apqche avenue along Railroad avenue to Savage avenue.
From Apache avenue along Santa Fe avenue to Moulton avenue.
From Galisteo avenue along Topeka avenue to Moulton avenue.
From Mora avenue along Atchison avenue to Moulton avenue.
From Mora avenue along Tunnel avenue to Miembres avenue, and
From Apache avenue along Raton avenue to Miembres avenue.

Also a main pipe along the principal street on the east side of the railroad in said town.

And the court doth further find that on the 9th day of May, 1892, the board of trustees of said town did issue an order under the terms and conditions of said ordinance and contract, and did thereby order and contract that fire hydrants or plugs should be set by said complainant company in addition to the fire hydrants or plugs theretofore set on the southeast corner of the following blocks in the Maxwell north addition to said town, to wit:

Blocks 1, 2, 3, 4, 5, 6, 7, 10, 11, and 13; and of the following blocks in the town-site addition to said town, to wit:

Blocks 1, 2, 3, 4, 8, 7, 6, 5, 44, 9, 10, 11, 12, 13, 18, 17, 16, 15, 14, 21, 22, 25, 24, 32, and 33, and on the following blocks in the Maxwell west addition to said town, to wit: Blocks "N," No. 1.

143 And the court doth further find that on the 20th day of June, 1892, the said defendant corporation, by the board of trustees thereof, did order and contract with said complainant to extend the first street or Railroad Avenue main to Rio Grande avenue and the second street or Santa Fe Avenue main to the middle of block No. 30, and that a fire-hydrant should be set at the southeast corner of block 27.

And the court doth further find that all of the said orders and directions so made by said defendant corporation were fully complied with and performed by the said complainant company.

And the court doth further find that in pursuance of the conditions of said ordinance, contract, and agreement 1,300 feet of water main were laid by said complainant company in said street in that portion of the said town of Raton lying east of the Atchison, Topeka & Santa Fe railroad, in said town, on which there were set up by said complainant two hydrants, and there were set in all 44 hydrants by the said complainant under and in pursuance of the said ordinance and contract.

And the court doth further find that the board of trustees of the said defendant, Town of Raton, did appoint a committee to investigate the plant of said complainant, and that said committee did on October 15, 1892, make a written report to the said board of trustees that the said plant had been constructed practically in accordance with the said ordinance and contract, and did recommend that the same should be accepted by the said defendant corporation under the conditions of the said ordinance and contract, and that the said water

144 works, mains, pipes, fire-plugs, hydrants, and plant so constructed and laid by the said complainant company were duly accepted by the said defendant, Town of Raton.

And the court doth further find that the said complainant company did construct the said water works and plant within the time and in accordance with the terms of the said ordinance, contract, and agreement, at a large expenditure of money, to wit, $115,000.00, and that the said complainant company did construct a rese-foir with a capacity of 42,000,000 *million* gallons of water, and did lay and construct six and seven-tenths mines of water mains of eight-inch capacity into said town of Raton in addition to the said main laid in said streets, and did have the same completed and in operation in supplying water to said defendant, Town of Raton, and its inhabitants within the time prescribed by the said ordinance, contract, and agreement, and has in all things strictly performed, complied with, and carried out the terms of the said ordinance and agreement, and did prior to January 1st, 1893, place, construct, and erect 44 hydrants and has ever since maintained the same for the use of the said defendant, The Town of Raton, and that said defendant town has ever since said last-mentioned date been and

now is in possession, occupancy, and use of the same under and by virtue of said ordinance and contract.

And the court doth further find that prior to the first day of April, 1895, the fiscal year of said defendant town commenced on the first day of April in each year, in pursuance of law, and that it was the duty of the board of trustees of said town within the last quarter of each fiscal year to pass an ordinance to be termed "annual appropriation bill" for the next ensuing fiscal year, and thereby to appropriate such — or sums of money as was necessary to defray the expenses and liabilities of said defendant town, and to in-
145 clude therein the amount necessary to make the said semi-annual payments to the said complainant company for the rental and use of said hydrants in pursuance of said ordinance and contract.

And the court doth further find that in pursuance of said duty so imposed by law the board of trustees of said defendant, Town of Raton, did, on, to wit, March 18, 1895, and within the last quarter of said fiscal year enact and pass an ordinance entitled "An ordinance relating to tax levy and appropriations for the years 1895 and 1896," and did thereby appropriate out of the moneys and revenues covered into the treasury of the said defendant town or to be collected and paid into the same from any and all sources during the fiscal year commencing on the first day of April, 1895, derived from taxes, licenses, fines and fees, and all other sources the sum of $4,735.15 for the payment of the amount then due and payable to the said complainant under and by virtue of the said ordinance and contract, and did thereby further appropriate the sum of *of* $3,925.00 for the payment of said complainant for hydrants so set and provided by said complainant, as aforesaid, for the year commencing January 1st, 1895, to wit, $4,735.15, and that the board of trustees of said defendant town did issue to said complainant warrants of said town as follows, to wit: Warrant number 536, dated January 1st, 1895, due six months after date, for the sum of $609.37; warrant No. 537, dated January 1st, 1895, due six months after date, for the sum of $500; warrant number 538, dated January 1, 1895, due October 1, 1895, for the sum of $609.38; warrant number 539, dated January 1, 1895, due October 1, 1895, for the sum of $500; warrant No. 540, dated January 1, 1895, and due January 1, 1896, for the sum of $609.37; warrant No. 541, dated January 1, 1895, due January 1, 1896, for the sum of $500; warrant No. 542, dated January 1, 1895, due April 1, 1896, for the sum *for the*
146 *sum* of $609.38; warrant No. 543, dated January 1, 1895, due April 1, 1896, for the sum of $500, all of said warrants bearing interest at the rate of 10% from date; warrant No. 544, dated March 18, 1895, payable on demand, for the sum of $297.65 for the interest due on account up to January 1, 1895; each of which said warrants was duly drawn on the treasurer of the town of Raton, signed by the mayor, and countersigned by the recorder of said town.

And the court doth further find that in pursuance of law it was the duty of the treasurer of the said town to have and keep in his

office a book to be called "The Register of Town Orders," wherein should be entered and set down, at the date of the presentation thereof, each of said warrants, and to pay out of the funds of said town in his hands for disbursements the amount of each of said warrants in order in which the same were presented to him for payment.

And the court doth further find that, although so requested so to do, the defendant prior to the commencement of this suit had refused and still refuses to perform the said agreement upon its part and to pay to said complainant the said semi-annual rental for the hydrants so set and provided by said complainant company at the said perio-s when the same became due and as the same would hereafter accrue in pursuance of said ordinance and contract, and that said complainant has fully performed its said agreement upon its part, and that the said defendant has been and now is in the possession, use, and enjoyment of the said water plant under said contract.

And the court doth further find that in addition to the amount of said rental payable to the said complainant on and prior to *to* January 1st, 1895, as hereinbefore stated, there became due to
147 the complainant company the sum of one thousand nine dred and sixty-two dollars and fifty cents.

And the court doth further find that the said defendant has refused and still refuses to pay the said amount heretofore accrued and payable to the said complainant company, and has refused and still refuses to pay the said several amounts which have heretofore accrued and which will hereafter accrue to the said complainant.

And the court doth further find that all the material allegations in the said bill of complaint of said complainant herein are true as therein stated.

And the court being of opinion that the said complainant, Raton Water Works Company, is entitled to the specific performance of the said ordinance, contract, and agreement on the part of the said defendant, Town of Raton, in accordance with the prayer of the said bill of complaint—

It is ordered, adjudged, and decreed by the court here that the said ordinance, contract, and agreement be in all things specifically performed by and on the part of the said defendant, Town of Raton, and that said defendant issue to the said complainant the warrants of the said town of Raton in proper form and payable out of any funds of money in the treasury of the said town of Raton derived from any levy of taxes, either general or special, or from licenses by said town of Raton in payment and satisfaction of the amounts of said rental of said hydrants which have heretofore accrued and become payable, in pursuance of the terms of the said ordinance, contract, and agreement entitled "Ordinance No. 10, granting franchise to Raton Water Works Company to erect and maintain water
148 works," published July 24, 1891, and hereinbefore found by this court to have heretofore become payable at the said several dates and periods herein mentioned or which shall hereafter

become payable at the respective dates and periods specified in said ordinance and contract.

It is further ordered that either of the said parties herein shall be at liberty to apply to this court for further directions or relief in the premises if occasion shall require.

And the said supreme court does further find and certify that the matter in dispute in the said cause, exclusive of costs and of interest, does exceed the sum of five thousand dollars.

The court further finds and certifies that said town of Raton had not contracted any indebtedness by borrowing money or issuing bonds for any purpose prior to the commencement of this action, and that prior to said date the said town had not in any one year levied or collected more than one per centum ad valorem upon the assessed value of the taxable property situated within the limits of the said town for all purposes.

Respectfully, THOMAS SMITH,
Chief Justice Supreme Court, Territory of New Mexico.

149 And afterwards, to wit, on the 12th day of January, 1898, in the said supreme court of the Territory of New Mexico, the following, among other, proceedings were had, to wit:

THE RATON WATER WORKS COMPANY, Appellees, *vs.* TOWN OF RATON, Appellant. } No. 705. Appeal from Dist. Court for Colfax County.

The above cause having come on to be heard upon the motion of H. L. Warren, Esq., of counsel for appellee, to approve and certify the findings of fact heretofore, to wit, on the 11th day of January, A. D. 1898, tendered to the court by said H. L. Warren on behalf of said appellee in its appeal from the judgment of this court in said cause to the Supreme Court of the United States, it is ordered that said findings of fact be referred to Associate Justice Laughlin for examination, and when the same shall be by him reported to
150 the chief justice of this court as true and correct the same shall be signed and certified by said chief justice and filed by the clerk of this court as of this date; and it is further ordered that the Raton Water Works Company enter into a cost bond to said town of Raton in the sum of two hundred and fifty dollars, with two surities thereon to be approved by the clerk of this court.

And afterwards, to wit, on the 12th day of February, A. D. 1898, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a cost bond; which said cost bond is in the words and figures following, to wit:

151 Know all men by these presents that we, Alva L. Hobbs, as principal, and Joseph B. Schroeder and Geo. J. Pace, as sureties, are held and firmly bound unto the town of Raton, New Mexico, in the full sum of two hundred and fifty dollars, to be paid to

said town of Raton, New Mexico, heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we, jointly and severally, bind ourselves, our heirs, executors, administrators, and assigns, firmly by these presents.

Witness our hands and seals this 10th day of Feb'y, A. D. 1898.

Whereas lately, at the July term, A. D. 1897, of the supreme court of the Territory of New Mexico, in a certain suit in the said court pending between the above-bounden principal, The Raton Water Works Company, as appellee, and The Town of Raton, New Mexico, as appellant, a judgment was rendered against the said The Raton Water Works Company, and the said The Raton Water Works Company having prayed an appeal from the said judgment of said supreme court of the said Territory of New Mexico to the Supreme Court of the United States:

Now, therefore, the condition of this obligation is such that
152 if the said The Raton Water Works Company shall prosecute said appeal to effect and answer all costs if it fail to make good its plea, then the above obligation to be void; otherwise to remain in full force and effect.

ALVA L. HOBBS. [SEAL.]
JOSEPH B. SCHROEDER. [SEAL.]
GEO. J. PACE. [SEAL.]

TERRITORY OF NEW MEXICO, }
County of Colfax. }

On this 10th day of Feb'y, A. D. 1898, before me personally appeared Alva L. Hobbs, to me personally known, who signed the foregoing obligation, and acknowledged that he signed, sealed, and executed the same as his free act and deed; and also personally appeared before me Joseph B. Schroeder and Geo. J. Pace, as sureties on said bond, who acknowledged each for himself that he signed, sealed, and executed said bond as their free act and deed, and each for himself said on oath that he is worth the sum of two hundred and fifty dollars in property in the Territory of New Mexico over and above all just debts and liabilities and amount by law exempt.

JOSEPH B. SCHROEDER.
GEO. J. PACE.

Subscribed and sworn to before me this 10th day of Feb'y, A. D. 1898.

[SEAL.] DAVID G. DWYER,
Notary Public.

The above bond is approved by me this 12th day of Feb'y, A. D. 1898.

[SEAL.] GEO. L. WYLLYS,
Clerk of the Supreme Court of the Territory of New Mexico.

153 And afterwards, to wit, on the — day of ——, A. D. 1898, there was filed in the office of the clerk of the supreme court

of the Territory of New Mexico a citation; which said citation is in the words and figures following, to wit:

The United States of America to the Town of Raton, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, within sixty days from this date, then and there to answer the appeal of the Raton Water Works Company taken from the judgment of the supreme court of the Territory of New Mexico rendered in your favor in a certain cause lately pending in said last-mentioned court, wherein The Raton Water Works Company was appellee and The Town of Raton was appellant, and to show cause, if any there be, why the said judgment should not be reversed, vacated, and set aside and speedy justice thereupon done between the parties.

Witness the Honorable Thomas Smith, chief justice of the supreme court of the Territory of New Mexico, this 12th day of January, A. D. 1898.

154 On behalf of the Town of Raton I hereby acknowledge service of above citation this 23rd day of February, A. D. 1898.

J. H. CRIST,
Attorney for the Town of Raton.

TERRITORY OF NEW MEXICO, }
Supreme Court. }

I, Geo. L. Wyllys, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing is a true and complete copy of the transcript of record and of all record entries in this court, together with a true copy of all papers on file in this court, in the cause lately pending in said supreme court entitled Town of Raton, appellant, *vs.* The Raton Water Works Company, appellee, numbered on the docket of said supreme court No. 705, as the same appears on file and remains of record in my office.

Witness my hand and the seal of said supreme court this 23rd day of February, A. D. 1898.

[Seal Supreme Court, Territory of New Mexico.]

GEO. L. WYLLYS, *Clerk.*

Endorsed on cover: Case No. 16,837. New Mexico Territory supreme court. Term No., 272. The Raton Water Works Company, appellant, *vs.* The Town of Raton. Filed March 29th, 1898.

No 272.

Brf. of Forster for Appt.

IN THE

Supreme Court of the United States.

Filed Feb. 1, 1899.

OCTOBER TERM, 1898.

No. 272.

THE RATON WATER WORKS COMPANY,
Appellant,

against

THE TOWN OF RATON,
Appellee.

APPELLANT'S BRIEF.

HENRY A. FORSTER,
Of Counsel for Appellant.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 272.

THE RATON WATER WORKS COMPANY,
Appellant,

AGAINST

THE TOWN OF RATON,
Appellee.

Appellant's brief.

Appeal from a final decree of the Supreme Court of the Territory of New Mexico, which reversed a decree of the district court, in favor of the complainant, for the specific performance of a contract, and dismissed the bill. The dismissal was on the ground that as the part of the municipal ordinance which comprised the provision of the contract that was in question, was invalid, the obligation of the contract was not impaired by later ordinances, which in effect partly repealed it.

Certificate, p. 66.
Opinion, pp. 38-9, 50.

The Raton Water Works Company (hereafter called the Water Company) filed a bill against the Town of Raton (hereafter called the town) to compel the specific performance of a contract for the building of water works and the furnishing of water therefrom for municipal and private purposes, that was contained

in town ordinance No. 10, passed July 24, 1891 (Bill, pp. 1-12; Ordinance, pp. 18-24, 55-60, 67-72), which ordinance had been ratified and confirmed by a vote of the qualified electors of the town, and had been accepted by the Water Company (Bill, p. 1; Ans., p. 13; Findings, pp. 24, 60-1, 72-3); and also for an injunction to restrain certain breaches of the ordinance.

Acting under the ordinance, the Water Company built water works to supply the inhabitants of the town with water, including a reservoir with a capacity of 2,000,000 gallons of water, several miles of eight inch mains, and forty four hydrants, at an expense of $115,000. The town accepted the plant and leased forty-four hydrants from the Water Company (Bill, pp. 3-4; Acceptance, pp. 8-9; Ans., pp. 13-14; Findings, pp 26-7, 62-3, 75-6). The town agreed by the ordinance to pay a specified rent for each hydrant for the term of twenty-five years (Ordinance, pp. 21, 58, 70), aggregating, $1,962.50 every six months (Bill, p. 4; Ans., p. 15; Findings, pp. 28, 65, 77) and "to "levy and collect a tax sufficient for the purpose of "making said semi-annual payments for each and "every one of the twenty five years aforesaid" (Ordinance, pp. 21, 58, 70).

On March 18, 1895, the town board of trustees enacted and passed "An Ordinance Relating to Tax Levy "and Appropriations for the Years 1895 and 1896" which appropriated "Amount due the Raton Water "Works Company, up to January 1st, 1895 $4,735.15 * * *

"Amount to pay water works Co., for fire hy-"drants, for the year commencing January 1st, A. D., "1895 $3,935." out of the revenue for the fiscal year commencing April 1, 1895 (Ordinance No. 59, pp. 9-10).

On May 23, 1895 (p. 5), the board of trustees enacted and passed a new ordinance entitled "An Ordinance "Relating to Tax Levy and Appropriations for the "Years 1895 and 1896," which omitted both appropriations for the payment of hydrant rent, and in place

thereof appropriated " To supply the town with water " $1,500 " (Ordinance No. 64, pp. 11-12).

In order to prevent any payments being made under ordinance No. 59, ordinance No. 64 provided:

" SEC. 8. Any moneys received or expended during the months of April and May, A. D., 1895, shall be included in the receipts and expenditures of the fiscal year commencing June 1st, 1895."

(Ordinance No. 64, p. 12.)

The effect of ordinance No. 64 is to repudiate $4,735.15 of hydrant rents for previous years as well as $2,435 of the rent for the then current year. The effect of putting back the commencement of the fiscal year by two months is to deprive the town treasurer of all power to pay warrants for over $4,400 of hydrant rents for previous years, that had been issued to the Water Company, but which were not payable until July 1, 1895, or later.

On and prior to March 18, 1895, the town board of trustees had issued to the Water Company the following warrants for hydrant rent.

No.	Date.	Amount.	When due.
536	Jany. 1 1895	$609.37	July 1 1895
537	Jany. 1 1895	500.	July 1 1895
538	Jany. 1 1895	609.38	Oct. 1 1895
539	Jany. 1 1895	500.	Oct. 1 1895
540	Jany. 1 1895	609.37	Jany. 1 1896
541	Jany. 1 1895	500.	Jany. 1 1896
542	Jany. 1 1895	609.38	Apr. 1 1896
543	Jany. 1 1895	500.	Apr. 1 1896
544	Mch. 18 1895	297.65	On demand
		$4,735.15	

(Bill, p. 5; Ans., p. 14. Findings, pp. 27-8, 64, 76).

After warrants Nos. 536 and 537 became due, they were presented to the town treasurer for registration, but he refused to register them (Bill, p. 6; Ans., p. 15).

On June 12, 1895, the board enacted and passed an ordinance providing:

"SECTION 1. That from and after the date of the passage and publication of this ordinance all the town warrants issued after June 1st, 1895, shall be received in payment of all town licenses."

(Ordinance No. 65, misprinted as No. 36, p. 12.)

The effect of this ordinance is to render ineffectual any mandamus to enforce the payment of the warrants by substituting scrip for lawful money of the United States in the fund out of which warrants are payable. By the laws of New Mexico, the Treasurer of a town is required to register each town warrant in the order in which it is presented, and to pay them out of the town funds accordingly.

New Mexico Compiled Laws, 1884, §§ 1649-1650.

The answer admitted the passage of ordinance No. 10; that it was ratified and confirmed by the qualified voters of the town; that it was accepted by the Water Company; that the Water Company complied with the ordinance and laid pipes, mains, fire hydrants and plugs as alleged in the bill; that the trustees of the town accepted the Water Company's plant (p. 13); that the Water Company had complied with and carried out the terms of the ordinance, and had prior to January 1, 1893, placed, constructed and erected forty four hydrants and had ever since maintained them for the use of the town; that the town has possessed and used them under and by virtue of the contract (p. 14); that the town had been and now is in the possession, use and enjoyment of the water plant of the complainant (p. 15); that the board of trustees of the town issued to the Water Company the warrants described in the bill (p. 14) for the payment of hydrant rents (Bill, p. 5); that warrants Nos. 536 and 537 were presented to the town treasurer for registration, after they became due, and were refused registration by the town treasurer (Ans., p. 15; Bill, p. 6); and that the

board of trustees of the town passed the various ordinances which the Water Company complained of (pp. 14–15).

The answer denied that ordinance No. 10 ,under which the water works were built, was or is valid and operative (p. 13) ; denied that under the ordinance and contract it was or is the duty of the town to pay the Water Company as rental for the forty four hydrants, the sum of $1,962.50 every six months (p. 14) ; denied that $1,962.50 became due to the Water Company every six months (p. 15) ; and specifically denied that it was or is the duty of the town under the contract or ordinance to levy and collect a tax sufficient to meet the semi annual obligations of $1,962.50 (Ans., p. 14) as provided in the ordinance (Ordinance, pp. 21, 58 ; Bill, p. 6).

The answer admitted that the town had given out that the contract, so far as it called for the payment of $1,962.50 semi annually, is inoperative and invalid, and further admitted that it had refused to pay the said sum of $1,962.50 semi annually ; that the cause of such refusal is that under the law of New Mexico the town is only authorized to collect a special tax to pay the water rents agreed to be paid to the Water Company to the extent of two mills on the dollar for any one year, and that under the law the town paid the Water Company each year the full proceeds of the two mill tax levy authorized by law for water rents (pp. 15-16).

The answer alleged that for the year 1891 the total assessment for town purposes was $628,940, that the town tax rate was five mills on the dollar and the taxes collected were only $2,089.52 ; that for the year 1892 the total assessment was $673,900, the tax rate was eight mills on the dollar and the taxes collected were $3,204.39 ; that for the year 1893 the total assessment was $807,230, the tax rate was six mills on the dollar, and the taxes collected were $2,718.83, and that for the year 1894 the total assessment was $650,620, the tax rate was ten mills on the dollar and the taxes collected were $3,616.52 (Ans., p. 16).

The answer also alleged that the warrants issued to the Water Company, in payment of hydrant rents (Bill, p. 5), were and are null and void, having been issued by the trustees of the town in excess of the amount derived from a two mills tax levy on each dollar of taxable property (Ans., p. 16); that ordinance No. 64 was and is valid and in full force (p. 17), and that ordinance No. 65 was and is valid and in full force and effect (p. 15).

The case was heard on the bill and answer (pp. 18, 67).

The district court (held by the Chief Justice of the Territory) decided that the contract contained in ordinance No. 10 was in all respects valid and awarded a decree for its specific performance by the town.

Findings, pp. 18–28, 67–77.
Decree, pp. 28–9, 77–8.

The town appealed to the territorial supreme court, which reversed the decree of the court below, and dismissed the bill (p. 30).

After the territorial supreme court had allowed the appeal to this court, it filed the statement of facts in the nature of a special verdict, which is required by § 2 of the Act of April 7, 1874 (18 U. S. Stat. at Large, p. 28), on appeals from territorial courts, in which it certified as follows:

"The court does certify that said ordinance" No 10, "so far as the same imposes upon the defendant the obligation to pay complainant an annual sum greater than the proceeds of a two mill tax levy or to impose a tax levy greater than said rate, was and is null, void, and inoperative, the same having been made and entered into by defendant's trustees in violation of law and in excess of powers conferred upon them by the statutes of New Mexico."

(p. 66.)

"and the court does certify that said warrants issued to complainants, as set forth in complainant's bill, were and are null and void, having been issued by the defendant's trustees in excess of the amount derived from a two mills levy on each dollar of taxable

property thus and having thus been issued contrary to law and in excess of the authority conferred by law upon said trustees."

(p. 66.)

"and the court does certify that * * * ordinance number 59" "was and is void and inoperative, and that ordinance number 64," "was and is valid and in full force."

(Certificate, p. 66.)

The opinion is to the same effect. The gist of it is contained in the two following paragraphs:

"We are now brought directly to the first question for determination: Had the trustees of the defendant town corporation the authority to enact ordinance No. 10 and enter into the contract in question, and thereby bind the defendant town to pay out of the revenues derived by taxation for the general purposes any sum in excess of that to be derived from a levy of two mills on the dollar on its taxable property for each year? We are of the opinion that the trustees did not have authority and power to so contract and bind defendant town in the manner as provided in said ordinance No. 10."

(pp. 38–9; 49 Pacific Reporter 902.)

"As the town has heretofore, it is undisputed, more than complied with its obligation by paying an amount in excess of what could have been derived from a two mills levy, and as ordinance No. 64 provides for the entire proceeds of a two mills levy being paid to complainant, it is apparent that its bill is without equity and should be dismissed."

(p. 50; 49 Pacific Reporter 909.)

The New Mexican statutes as to the powers of municipal corporations in force in 1891, when ordinance No. 10 was passed, are as follows.

Compiled Laws of New Mexico, 1884, provide:

"§ 1621. All municipal corporations organized under this act shall have the general powers and privileges, and be subjected to the rules and restrictions granted and provided in the sections of this act.

"Powers.

"§ 1622. The city council and board of trustees in towns shall have the following powers.

"FIRST—To control the finances and property of the corporation.

"SECOND—To appropriate money for corporate purposes only, and provide for payment of debts and expenses of the corporation.

"THIRD—To levy and collect taxes for general and special purposes on real and personal property.

"FOURTH—To fix the amount, terms, and manner of issuing and revoking licenses.

"FIFTH—To erect all needful buildings for the use of the city or town.

"SIXTH—To contract an indebtedness on behalf of the city, and upon the credit thereof by borrowing money or issuing the bonds of the city or town, for the following purposes, to wit: For the purpose of erecting public buildings; for the purpose of constructing sewers for the city or town; for the purpose of the purchase or construction of water works for fire and domestic purposes; for the purpose of the construction or purchase of a canal or canals, or some suitable system for supplying water for irrigation in the city or town; for the purpose of the construction or purchase of gas works for manufacturing illuminating gas, or purchasing illuminating gas; and for the purpose of supplying a temporary deficiency in the revenue for defraying the current expenses of the city or town. The total amount of indebtedness for all purposes shall not at any time exceed five per centum of the total assessed valuation of the taxable property in the city or town, except such debt as may be incurred in supplying the city or town with water and water works; and no loan for any purpose shall be made, except it be by ordinance, which shall be irrepealable until the indebtedness therein provided for shall be fully paid, specifying the purposes to which the funds to be raised shall be

applied, and providing for the levying of a tax not exceeding, *in total amount for the entire indebtedness of the city and town*, (excepting such debt as may be incurred in supplying the city or town with water or water works,) eight mills upon each dollar valuation of the taxable property within the city or town, sufficient to pay the annual interest and extinguish the principal for such debt within the time limited for the debt to run, which shall not be less than ten years nor more than thirty years, and providing that said tax, when collected, shall only be applied to the purpose in said ordinances specified, until the indebtedness shall be paid and discharged; but no such debt shall be created, except for supplying the city or town with water, unless the question of incurring the same shall, at a regular election of officers for the city, be submitted to a vote of such qualified electors of the city or town as shall in the next preceding year have paid a property tax therein, and a majority of those voting upon the question, by ballot deposited in a separate ballot box, shall vote in favor of creating such debt."

"SIXTY SEVENTH—They shall have power to erect water works, or gas works, or authorize the erection of the same by others; but no such works shall be erected or authorized until a majority of the voters of the city or town, voting on the question at a general or special election, by vote approve the same."

"SIXTY NINTH—When the right to build and operate such water and gas works is granted to private individuals or incorporated companies by said cities and towns, they may make such grants to inure for a term of not more than twenty-five years, and authorize such individuals or companies to charge and collect from each person supplied by them with water or gas, such water or gas rent as may be agreed upon between said persons or corporations so building said works and said city or town, and such cities or towns are authorized and empowered to enter into a contract with the individual or company constructing said works, to supply said city or town with water for fire purposes thereof,

and for such other purposes as may be necessary for the health and safety thereof, and also with gas, and to pay therefor such sum or sums as may be agreed upon between said contracting parties."

"SEVENTY FIRST—All cities and incorporated towns constructing such water or gas works are authorized to assess, from time to time, in such manner as they shall deem equitable, upon each tenement or other place supplied with water or gas, such water or gas rents as may be agreed upon by the council or trustees, or upon each vacant lot in front of which the pipes commonly called 'street mains' are laid, but such vacant lots as do not take water from such 'street mains' shall not be assessed more than one-half as much as may be assessed against the same amount of frontage of lots occupied by a one-story building; and gas should be charged for by the foot, and then only to such as use it; and at the regular time of levying taxes in each year, said city or town is hereby empowered to levy and cause to be collected, in addition to the other taxes authorized to be levied, a special tax on taxable property in said city or town, which tax, with the water or gas rent hereby authorized, shall be sufficient to pay the expenses of running, repairing, and operating such works; and if the right to build, maintain and operate such works is granted to private individuals or incorporated companies by such cities or towns, and said cities or towns shall contract with said individuals or companies for a supply of water or gas for any purpose, such city or town shall levy each year and cause to be collected a special tax, as provided for above, sufficient to pay off such water or gas rents so agreed to be paid to said individuals or company, or company constructing said works: *Provided*, however, that said last-mentioned tax shall not exceed the sum of two mills on the dollar for any one year."

"APPROPRIATIONS AND EXPENDITURES.

"§ 1636. The fiscal year of each city or town organized under this act shall commence on the first day of April in each year, or at such other time as may be fixed by ordinance. The city council of cities and board of trustees in towns shall, within the last quarter of each fiscal year, pass an ordinance to be termed the annual appropriation bill for the next fiscal year, in which such corporate authorities may appropriate such sum of money as may be deemed necessary to defray all expenses and liabilities of such corporation, and in such ordinance shall specify the objects and purposes for which such appropriations are made and the amounts appropriated for each object or purpose. No further appropriations shall be made at any other time within such fiscal year, unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city or town, either by a petition signed by them, or at a general or special election duly called therefor. Nor shall the total amount appropriated exceed the probable amount of revenue that will be collected during the fiscal year."

"§ 1638. No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof, and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided."

"§ 1649. Every treasurer of any incorporated city or town of this Territory shall have and keep in his office a book to be called the registry of city or town orders, wherein shall be entered and set down at the date of the presentation thereof, and without any interval or blank line between any such entry and the one preceding it, every city or town order, warrant, or

other certificate of such town or city indebtedness, at any time presented to such town or city treasurer for payment whether the same be paid at the time of presentation or not, the number and date of such order or certificate, the amount, the date of presentation, and the name of the person presenting the same, and the particular fund, if any, upon which the order is drawn. Every such registry of city or town orders shall be open at all seasonable hours to the inspection of any person desiring to inspect or examine the same.

"§ 1650. Every fund in the hands of any treasurer of any such city or town of this Territory for disbursement shall be paid out in the order in which the orders drawn thereon and payable out of the same shall be presented for payment."

"Limit of Taxation.

"§ 1724. No more than one per centum ad valorem shall ever be levied or collected, by any corporation organized under this act, upon the assessed value of the taxable property situate within the limits of such corporation for all purposes, and no indebtedness shall be incurred which will require any greater annual expenditure than said one per centum per annum will fully pay off and satisfy."

Assignment of Errors.

It is assigned for error that the Supreme Court of the Territory of New Mexico

1. Erred in reversing the decree of the District Court.

2. Erred in dismissing the bill.

3. Erred in finding that the board of trustees of the town of Raton did not have the power to contract and

bind the town in the manner provided by town ordinance No. 10, and thereby to bind the town to pay out of the revenue derived by taxation for general purposes, any sum in excess of the revenue to be derived from a levy of two mills on the dollar on its taxable property for each year.

4. Erred in finding that by reason of the provisions of paragraph 71 of section 1622 of the Compiled Laws of 1884 of the Territory of New Mexico, the trustees of the Town of Raton were limited, and were thereby inhibited from making and entering into the contract embodied in ordinance No. 10, and from thereby contracting to pay and from paying any greater sum of money than the sum derived by a special tax levy of two mills on the dollar during each fiscal year, upon the property subject to taxation within the corporate limits of the town of Raton.

5. Erred in deciding that the warrants issued to complainant are null and void.

6. Erred in deciding that ordinance No. 59 is void and inoperative.

7. Erred in deciding that ordinance No. 64 is valid and in full force.

8. Erred in not deciding that ordinance No. 64 is void as impairing the obligation of the contract contained in ordinance No. 10.

9. Erred in not deciding that ordinance No. 65 impairs the obligation of the contract contained in ordinance No. 10.

Points.

I. Ordinance No 10 created a contract by which the Water Company built a water works system for the use of the inhabitants of the town, and leased forty four hydrants to the town for the term of twenty five years, and the town agreed to pay hydrant rent at the rate of $1,962.50 every six months, and "to levy and collect a tax "sufficient for the purpose of making said "semi annual payments for each and every "one of the twenty five years aforesaid." The contract to pay the semi annual hydrant rent is one relating to the ordinary expenses of the town, and the rent agreed to be paid is payable out of the general revenues of the town among its other current expenses.

1. On July 24, 1891, the board of trustees of the town passed ordinance No 10 granting the Water Company an exclusive franchise to supply the town with water "for a term of twenty five years from the 15th day of "July, A. D. 1891." The ordinance named certain streets through which mains were to be laid, provided that the board of trustees should locate twenty five hydrants, and that the works should be capable of furnishing one million gallons of water a day, with a fire pressure of eighty pounds to the square inch on Fourth Street (pp. 19-24).

The parts of the ordinance material to this appeal are as follows:

"SEC. 4. Said Raton Water Works Company, its successors or assigns, shall lay and extend pipes for carrying said water to any part of the aforesaid town when requested so to do by the board of

trustees; *Provided*, persons owning property along the line of such proposed extensions shall take a reasonable amount of water, and *provided also*, there shall be ordered set in each street or lane by said trustees, on which said company or its assigns shall be required to lay pipe, one hydrant for every eight hundred feet of main pipe so laid or extension ordered * * *

"SEC. 10. In consideration of the benefits that will accrue to the town of Raton and its people, by the erection and operation of water works, and for the better protection of the town against fires, the town of Raton does hereby agree and bind the said town to rent from the said Raton Water Works Company or its assigns, for the aforesaid term of twenty-five years, twenty-five hydrants for the purpose of extinguishing fires and purposes pertaining to the fire department, flushing sewers, and irrigating public school grounds and parks, and the said town by the said board of trustees hereby agrees and binds the said town to pay to the said Raton Water Works Company or its assigns, at the rate of one hundred dollars per year for each of said twenty-five hydrants. That the said board of trustees further agree and bind the said town of Raton to pay said Raton Water Works Company or its assigns, the sum of seventy-five dollars per year for each hydrant for the next twenty-five additional hydrants that may be ordered set and erected by said board of trustees, and fifty dollars per year for each subsequent hydrant ordered set and erected thereafter by said board of trustees; *Provided*, the said Raton Water Works Company, or its assigns, shall erect and maintain, at all times, in good repair, double discharge fire hydrants with four-inch connections to the main pipe and two and one-half inch hose connections with each hydrant.

"SEC. 11. That the said town of Raton shall pay to the said Raton Water Works Company or its assigns, as follows, to wit: on the first day of January and July of each and every year one half of the aforesaid money and for all additional hydrants thereafter in like manner on the 1st day of January and July as aforesaid. The said town agrees to levy and collect a tax sufficient for the purpose of making said semi annual payments for each and every one of the twenty-five years aforesaid, and in default of making said payment the said town shall pay interest on said semi-annual payments at the rate of ten per cent per annum."

"SEC. 15. Within thirty days after the granting of this franchise, the said Raton Water Works Company shall file with the town recorder of said town, its acceptance in writing, of all the

terms, provisions and conditions of this ordinance, which acceptance, before filing, shall be duly acknowledged * * * *; *Provided*, the same shall be ratified by a vote of the people of this town as is hereinafter provided.

"SEC. 16. An election for the ratification or rejection of this ordinance shall be held in the town of Raton, at the hose house on the 1st day of August, A. D. 1891."

(pp. 20-3.)

The ordinance was ratified and confirmed by a vote of the qualified electors of the town and was accepted by the Water Company (Bill, p. 1; Ans., p. 13; Findings, pp. 24, 60-1, 72-3). The Water Company then built its works at an expense of $115,000; and located forty four hydrants in the places designated by the town. The town accepted the plant and leased the forty four hydrants from the Water Company, at a rent aggregating $1,962.50 every six months (Bill, pp. 3-4; Acceptance, pp. 8-9; Ans., pp. 13-15; Findings, pp. 26-8, 62-3, 65, 75-7).

The Water Company has ever since maintained the water works and hydrants for the use of the town, and the town has been and now is in the possession, use and enjoyment of the complainant's water plant and of the forty four hydrants, under and by virtue of the contract (Ans., pp. 14-5).

By these acts a contract was created which is protected by the Constitution of the United States from any municipal legislation impairing its obligations.

New Orleans Water Works Co. v. Rivers, 115 U. S., 674.
St. Tammany Water Works v. New Orleans Water Works, 120 U. S., 64.
Walla Walla v. Walla Walla Water Co., 172 U. S., 2, 9, 10.

2. The validity of ordinance No. 10 may be questioned on two grounds.

(*a*) The territorial Supreme court held that the town board of trustees had no power to enact ordinance No. 10, because the hydrant rent which it created was more than could be discharged by the two mills tax levy provided for by subdivision 71 of § 1622 of the

New Mexico Compiled Laws of 1884; and that ordinance No. 59 and the warrants issued to the complainant, are void (Opinion, pp. 38–9, 50; Certificate, p. 66).

(*b*) On this appeal it may also be claimed that ordinance No. 10 created an "indebtedness" within the meaning of the Harrison Act (24 U. S. Stat. at Large, p. 171) for the full amount of the stipulated hydrant rents, and is therefore partly invalidated by the provision of the Harrison Act which limits the indebtedness of territorial municipalities to four per cent. of the taxable property within their limits.

Neither of these objections is well taken.

3. After the semi-annual hydrant rents have been earned, they are a part of the ordinary expenses of the town as fully as any other of its unpaid current expenses, and for any balance remaining due on account of principal or interest after the application thereto of the proceeds of the two mill tax, the Water Company is entitled to payment out of the general funds of the town. The limitations in subdivision 71 of § 1622 of the New Mexico Compiled Laws of 1884, are not upon the power to contract for a supply of water for public uses, but upon the power to levy this special tax of two mills on the dollar in aid of the payment therefor. When the two mill tax is insufficient the deficiency must be paid from the general revenues of the town.

United States v. County of Clark, 96 U. S., 211, 214–5.
United States v. County of Macon, 99 U. S., 582, 589.
County of Macon v. Huidekoper, 99 U. S., 592.
Knox County v. United States, 109 U. S., 229–230.
Macon County v. Huidekoper, 134 U. S., 332, 336.
Creston Water works Co. v. City of Creston, 101 Iowa, 687,695–7.

In Creston Waterworks Co. v. City of Creston, 101 Iowa, 687, section 641 of the Iowa code authorizes cities or towns to contract with an individual or company

operating water works " to supply said city or town with " water for fire purposes, and for such other purposes " as may be necessary for the health and safety thereof, " and to pay therefor such sum or sums as may be " agreed upon between said contracting parties " (101 Iowa 693). Section 643 of the code provides that " if " the right to build, maintain, and operate such works " is granted to private individuals or incorporated " companies by such cities or towns, and said cities or " towns shall contract with said individuals or com- " panies for a supply of water for any purpose, such " city or town shall levy each year, and cause to be " collected, a special tax as provided for above, suffi- " cient to pay off such water rents so agreed to be paid " to said individual or company constructing said " works; provided, however, that said tax shall not " exceed the sum of five mills on the dollar for any " one year " (101 Iowa, 694).

It was held that " when the fund arising from such " special tax is insufficient to meet the obligation of " the city under its contract, it may meet the deficiency " from its general revenues ".

The court say (101 Iowa, 695–7):

" The limitations in section 643 are not upon the power to contract for a supply of water for public uses, but upon the power to levy this special tax in aid of the payment therefor. When, within the limit of the five mill tax, the supply can be thus paid for, it must be so paid; but when that source is not sufficient, the deficiency may be paid from the general revenues. * * * Looking to the statutes referred to, we have no doubt as to the power of the defendant city to contract as it did, nor of its right and liability to pay any deficiency that may remain after applying the proceeds of the five-mill levy, out of its general revenues in satisfaction of the agreed price for water for public uses."

In United States v. County of Clark, 96 U. S., 211, a county subscribed for stock of a railroad corporation, and issued bonds in payment therefor, pursuant to the following statute: " It shall be lawful for the cor- " porate authorities of any city or town, or the county

" court of any county, desiring so to do, to subscribe " to the capital stock of said company, and may issue " bonds therefor, and levy a tax to pay the same not " to exceed one-twentieth of one per cent. upon the " assessed value of taxable property for each year " (96 U. S. 212-3).

It was held " that the bonds are debts of the county " as fully as any other of its liabilities, and that for " any balance remaining due on account of principal " or interest after the application thereto of the pro- " ceeds of such tax the holders of them are entitled to " payment out of the general funds of the county."

The court say (96 U. S. 214-5):

" The question presented by the record is, whether the relator is entitled to payment of his judgment out of the general funds of the county, so far as the special tax of one-twentieth of one per cent. is insufficint to pay it. And we think that he is thus entitled is plain enough, unless the act which gave the county authority to issue the bonds directs otherwise. That act gave plenary authority to the county to subscribe to the capital stock of the railroad company and to issue bonds therefor, but imposed no limit upon the amount which it empowered a county to subscribe, and for the payment of which authority was given for the issue of county bonds. This was left to the discretion of the county court. So it has been held by the Supreme Court of the State. State v. Shortridge *et al.*, 56 Mo., 126. A limitation was, however, prescribed for the special tax which was allowed to be levied. But that was a special tax, distinct from and in addition to the ordinary tax which, by other statutes, the county court was authorized to levy; probably supposed to be made necessary by the new liabilities the county might assume. There is no provision in the act that the proceeds of the special tax alone shall be applied to the payment of the bonds. None is expressed, and none, we think, can fairly be implied. It is no uncommon thing in legislation to provide a particular fund as additional security for the payment of a debt. It has often been done by the States, and more than once by the Federal government. The act of Congress of Feb. 25, 1862 (12 Stat. 346), set apart the coin paid for duties on imported goods as a special fund for the payment of interest on the public debt and for the purchase of one per cent. thereof for a sinking fund; yet no one ever thought the obligation to pay the debt is limited by the

amount of the duties collected. Limitations upon a special fund provided to aid in the payment of a debt are in no sense restrictions of the liability of the debtor. Why, then, must not the special tax of one-twentieth of one per cent. be regarded as merely an additional provision made for the payment of the new debt authorized, rather than as a denial to the creditors of any resort to the ordinary sources from which payment of county debts is to be made? Why should such a provision be construed as placing the holders of the bonds in a worse situation than that of other creditors of the county? These bonds are a debt of the county as fully as is any other liability. Had the act which gave power to the county to issue them said nothing of any special tax, there could be no question that the holders of the bonds, like other creditors, would have a resort to the money in the county treasury collected for the discharge of its obligations. * * * * And surely it is not to be held, unless such a construction of the statute is absolutely necessary, that when the legislature authorized the county to incur the debt, it intended to deny to the creditor the right to look to the treasury of the county for its payment; in other words, that the debt was sanctioned, but that it was stripped of the usual incidents of a debt, and the debtor was relieved from attendant liabilities. And it is not to be inferred, from a provision giving the creditor the benefit of a special fund, that it was intended to place him in a worse position than that he would have occupied had no such provision been made. And that, too, in the absence of any direction that he must look exclusively to that fund. Such is not a reasonable construction of the statute. Such is not a fair implication of its purpose. It accords neither with its letter nor with its spirit."

4. The contract to pay the semi annual hydrant rents is one relating to the ordinary expenses of the town, and the rent agreed to be paid is payable out of the general revenues of the town among its other current expenses. It is not payable exclusively out of the special fund provided by the two mill tax; nor does it constitute an "indebtedness" within the meaning of the New Mexico Compiled Laws of 1884, or the Harrison Act (24 U. S. Stat. at Large, p. 171).

Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19–21.

GEORGIA.

Lott v. Mayor, 84 Ga., 681–3.

ILLINOIS.

E. St. Louis v. E. St. L. G. L. & C. Co., 98 Illinois, 416, 430.

Carlyle Water, Light & Power Co. v. City of Carlyle, 31 Illinois App., 325, 339; 140 Illinois, 445, 453.

INDIANA.

City of Valparaiso v. Gardner, 97 Indiana, 2, 5–6.

Foland v. Town of Frankton, 142 Indiana, 546, 548–550.

Seward vs. Town of Liberty, 142 Indiana, 551, 554.

IOWA.

Grant v. City of Davenport, 36 Iowa, 396, 402–4.

Burlington Water Co. v. Woodward, 49 Iowa, 58.

Des Moines v. Waterworks Co., 95 Iowa, 367.

Creston Waterworks Co. v. City of Creston, 101 Iowa, 687, 695–7.

LOUISIANA.

Laycock v. City, 35 La. Ann., 475, 479.

New Orleans Gas Light Co. v. City of New Orleans, 42 La. Ann., 188.

MASSACHUSETTS.

Smith v. Dedham, 144 Mass., 177, 180.

MISSOURI.

Saleno v. Neosho, 127 Missouri, 627, 638–641.

Lamar W. & E. L. Co. v. City of Lamar, 128 Missouri, 189, 223.

Water Co. v. City of Neosho, 136 Missouri, 498, 511.

Water & Light Co. v. City of Lamar, 140 Missouri, 145.

OKLAHOMA.

Territory *ex rel.* Woods v. Oklahoma, 37 Pacific Rep., 1094.

NEW YORK.

Utica Water Works Co. v. City of Utica, 31 Hun, 427, 430–1.

PENNSYLVANIA.

Wade v. Borough, 165 Pennsylvania, 479, 488.

WASHINGTON.

Winston v. Spokane, 12 Washington, 524–7.
Faulkner v. City of Seattle, 53 Pacific Rep., 365.

WISCONSIN.

Merrill Ry. & L. Co. v. City of Merrill, 80 Wis., 358, 361.

In Walla Walla v. Walla Walla Water Co., 172 U. S., 1, a city agreed to pay a Water Company a hydrant rental of $1,500 per annum for twenty five years, or an aggregate amount of $37,500. The city charter limited the "indebtedness of the city" "at fifty thousand "dollars." At the time the contract was made, the city was indebted in a sum exceeding $16,000, which, if added to the aggregate amount of hydrant rentals, would create a debt exceeding the limited amount of $50,000 (172 U. S., 19).

It was held that the amount of the hydrant rentals was not an indebtedness within the meaning of the charter.

The court say (172 U. S., 19–21) :

" But we think the weight of authority, as well as of reason, favors the more liberal construction that a municipal corporation may contract for a supply of water or gas or like necessary, and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the amount of the indebtedness limited by the charter. There is a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party perform the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as by the issue of railway bonds, or for the erection of a public improvement, though such debt be payable in the future by installments. In the one case the indebtedness is not created until the consideration has been furnished ; in the other the debt is created at once, the time of payment being only postponed.

" In the case under consideration the annual rental did not become an indebtedness within the meaning of the charter until the water appropriate to that year had been furnished. If the company had failed to furnish it, the rental would not have been payable at all, and while the original contract provided for the creation of an indebtedness, it was only upon condition that the company performed its own obligation. Wood v. Partridge, 11 Mass. 488, 493. A different construction might be disastrous to the interests of the city, since it is obviously debarred from purchasing or establishing a plant of its own, exceeding in value the limited amount, and is forced to contract with some company which is willing to incur the large expense necessary in erecting water works upon the faith of the city paying its annual rentals. Smith v. Dedham, 144 Mass. 177 ; Crowder v. Sullivan, 128 Indiana, 486 ; Saleno v. Neosho, 127 Missouri, 627 ; Valparaiso v. Gardner, 97 Indiana, 1 ; New Orleans Gas Light Co. v. New Orleans, 42 La. Ann. 188 ; Merrill Railway & Lighting Co. v. Merrill, 80 Wisconsin, 358 ; Weston v. Syracuse, 17 N. Y. 110 ; East St. Louis v. East St. Louis Lighting Co., 98 Illinois, 415 ; Grant v. Davenport, 36 Iowa, 396 ; Lott v. Waycross, 84 Georgia, 681 ; Burlington Water Co. v. Woodward, 49 Iowa, 58.

" The obvious purpose of limitations of this kind in municipal charters is to prevent the improvident contracting of debts for other than the ordinary current expenses of the municipality. It certainly has no reference to debts incurred for the salaries of

municipal officers, members of the fire and police departments, school teachers or other salaried employes to whom the city necessarily becomes indebted in the ordinary conduct of municipal affairs, and for the discharge of which money is annually raised by taxation. For all purposes necessary to the exercise of their corporate powers they are at liberty to make contracts regardless of the statutory limitation, provided, at least, that the amount to be raised each year does not exceed the indebtedness allowed by the charter. Among these purposes is the prevention of fires, the purchase of fire engines, the pay of firemen and the supply of water by the payment of annual rentals therefor."

Grant v. City of Davenport, 36 Iowa, 396, headnote: "A contract entered into by the city with a "company for the supply of water to the city for a "term of years by such company, who was to receive a "certain annual rate therefor, is one relating to the "ordinary expenses of the city, and the rate agreed to "be paid is not an indebtedness prohibited by the "constitution."

The court say (36 Iowa 402-3):

"But, if it can induce individuals or a corporation to construct and maintain such works for the use and benefit of the municipality and its inhabitants, and can pay a just and fair rent, as agreed, out of its current revenues, and can also, out of such revenues, pay its other ordinary expenses, we can see no sufficient reason for holding that an agreement to pay such rent either weekly, monthly, quarterly or annually, creates an indebtedness against the city. If it did create an indebtedness, then an ordinance providing for the payment of the salaries to the officers of the city would also create an indebtedness and would be invalid, where the maximum of indebtedness has already been reached. And such a construction would also render invalid every contract for the delivery of lumber to repair a bridge or a sidewalk, or for the hauling of gravel to repair a street, or for the employment of a laborer to work thereon."

And further, pp. 403-4:

"Suppose a man having a family to support and is without other means to do it, except his salary, which is adequate for that purpose. He is compelled to rent a house to live in, and by a contract for a term of years he can reduce its cost, and he therefore

makes a lease for ten years at $300 per year, or $3,000 for the term, the rent being payable monthly, quarterly or annually. Has that man created an indebtedness of $3,000? * * * * * We think not. Or, if instead of renting a house, he should contract for the board of his family for a like term, at $1,000 per year, does he thereby become indebted in the sum of $10,000? It seems to us not."

City of Valparaiso v. Gardner, 97 Indiana, 2, headnote:

"The limitation in the amendment to the Constitution, "adopted in 1881, to the indebtedness of any political "or municipal corporation, does not apply to water to "be paid for as the water is furnished, provided the "contract price can be paid from the current revenues "as the water is furnished, without increasing the "corporate indebtedness beyond the constitutional "limit, or encroaching upon funds set apart to other "purposes."

The court say (97 Indiana, 5):

"If we hold that the contract to pay an annual water rent of $6,000 during a period of twenty years creates a debt for the aggregate sum of $120,000, and is a debt within the prohibition embodied in the Constitution, we should lay down a principle that would, in a great majority of instances, put an end to municipal government. If it be true that an agreement to pay a given sum each year for a long period of years constitutes a debt for the aggregate sum resulting from adding together all the yearly installments, then it is extremely doubtful whether there is a city in the State that has authority to repair a street, dig a cistern or build a sidewalk, for nearly every city has contracts for gas and water supplies running for a long series of years, in which the aggregate amount of annual rents would of themselves equal, if not exceed, the limit of two per centum on the value of taxable property. We know, as matter of general knowledge, that water works and gas works require the outlay of enormous sums of money, and that such enterprises are not undertaken under contracts running for short periods of time. If the aggregate sum of all the yearly rents is to be taken as a debt within the meaning of the Constitution, then many cities will be left without the means of procuring things so essential to public welfare and safety. We are not to presume, unless coerced by the rigor of the words used, that the framers of

the amendment, or the electors who voted for it, intended to destroy the corporate existence of our municipalities or to leave them without water or light."

And further, p. 6:

"We can not, therefore, by mere intendment declare that the electors of the State meant to lay down a rule that should practically take from the inhabitants of our cities the power to supply themselves with water or light. To reach the conclusion that they meant to do this, we must find clear warrant in the language of the constitutional provision itself."

E. St. Louis v. E. St. L. G. L. & C. Co., 98 Illinois, 416, headnote: "Where a city entered into a contract "for lighting its streets for a term of thirty years, the "agreed price therefor to be paid monthly, which sum "for any one year was not in excess of the limitation "in sec. 12, of art. 9, of the constitution, but, taken for "the whole term, was in excess of the debt it was "authorized to incur, it was held, that the contract was "not prohibited by the constitutional provision, but "was legal and binding, there being created no pres-"ent indebtedness for the whole sum, but only as the "gas should be supplied from month to month."

The court say (98 Illinois, 430):

"We do not assent to the correctness of this view.

"The contract was for the furnishing of an article for nightly consumption by the city during a period of thirty years, fixing the price at which the article should be furnished. There was no indebtedness in advance of anything being furnished, but indebtedness arose as gas should have been furnished along from night to night during the period of thirty years. The contract provides for the payment, monthly, at the end of each month, the amount that became due for the month then ended. When the company has furnished the gas for a certain month, then there is a liability—an indebtedness arises—and not before, as we conceive. Hence the amounts that might become due and payable under the contract in future years, did not constitute a debt against the city at the time of the entering into the contract, within the meaning of the constitution."

In Smith v. Dedham, 144 Mass., 177, the selectmen of a town, under a vote of the town authorizing it to do so, made a contract with a water company for three years, at a certain rate a year, for the service of a certain number of hydrants. At the expiration of the three years, a town meeting was duly called and it was voted " that the selectmen be authorized to renew the contract " for ten years with the " water company at a reduced rate per year.

It was held that, by the vote, the town did not incur a debt, within the meaning of the Pub. Sts. c. 29, § 1.

The Court say (144 Mass. 180) :

" The contract which the selectmen are authorized to make is one which we assume is for a sum of money to be paid annually, among the other current expenses of the town. The payments are to be made out of the moneys annually granted by the town and raised by taxation. It is, in effect, a cash transaction, where the payments are made *pari passu* with the accumulation of the yearly service which determines the amount to be paid. Grant v. Davenport, 36 Iowa, 396. It is like the other ordinary expenses of the town, within the limit of its annual current expenses. The town of Dedham by its vote did not incur a debt, within the fair meaning of the Pub. Sts. c. 29, § 1."

Saleno v. City of Neosho, 127 Missouri, 627, head note : " A contract by a city to pay a fixed price " annually for twenty years for furnishing water, such " payment to be contingent on the water being sup- " plied, does not create an indebtedness on the part of " the city within the meaning of the constitution, " article 10, section 12, fixing the limit of municipal " indebtedness."

In Wade v. Borough, 165 Pa., 479, head note : " An " annual sum to be paid monthly for lighting the " streets of a borough for a limited term is not the in- " curring of a new indebtedness within the meaning of " the constitution, or of the act of April 20, 1874, P. " L. 65."

The court say (165 Pa. 488):

"An annual sum to be paid monthly for lighting the streets for a limited term, is not the incurring of a new indebtedness within the meaning of the constitution, or of the act of 1874; and there is no evidence that this contract was framed to evade the inhibitions of either. The borough binds itself to pay $133.33 per month for lighting the streets. This was a current expense, the same as if it had rented a council chamber for a fixed term of years, at a monthly rental. * * * *

"Therefore it was not, in any reasonable sense of the words as used in the constitution, the incurring of an indebtedness to the amount of the aggregate monthly installments for the seven years."

(a) Where an agreement is made to render services or to furnish supplies to a municipal corporation for a future period of time, and the corporation agrees to pay therefor at stated intervals, the future or periodical payments do not become obligatory and are not an indebtedness until the service or other consideration for that particular period has been rendered, the indebtedness being deemed to be conditional upon performance, and the debt limit applying only where an overdue payment will raise the indebtedness above the limit.

State v. McCauley, 15 California, 429, 454–5.
Mayor v. McWilliams, 67 Georgia, 106, 115.
Crowder v. The Town of Sullivan, 128 Indiana, 486–8.
Weston v. City of Syracuse, 17 N. Y., 110.
Garrison v. Howe, 17 N. Y., 458, 465.

(b) If this were not so the debt limit of every municipality might be exceeded by reason of the future salaries of its officers, the wages of its servants, and by the amount that would ultimately be earned on its contracts for gas, water, electric light and telephone service.

5. The town is estopped from questioning the validity of ordinance No. 10.

(a) A town which induces a Water Company to con-

struct a water works for its benefit (Ordinance, pp. 19, 21), at an expense of $115,000 (pp. 4, 26, 63, 75), which for several years has remained in the undisturbed use, enjoyment and possession of the complainant's water plant under and by virtue of the contract (Ans., pp. 14, 15) cannot, at least while enjoying the benefits of the contract, and while claiming that the contract still binds the Water Company to continue those benefits, refuse to pay the stipulated rent.

Illinois T. & S. Bk. v. Arkansas City, 40 U. S. App., 259, 293–7.
National Waterworks Co. v. Kansas City, 27 U. S. App., 166, 179.
Safety Insulated Wire and Cable Co. v. Baltimore, 25 U. S. App., 166, 170–4.
Fergus Falls Water Co. v. City of Fergus Falls, 65 Fed. Rep., 586, 591.
Walla Walla Water Co. v. City of Walla Walla, 60 Fed. Rep., 960–1; affd. 172 U. S., 1, 23.
Hitchcock v. Galveston, 96 U. S., 341, 350–1.
E. St. Louis v. E. St. L. G. L. & C. Co., 98 Illinois, 415, 427–9.
Water Works Co. v. City of Columbus, 48 Kansas, 99, 113–6.
State v. G. F. City Council, 19 Montana, 519, 533–5.
U. S. Water Works Co. v. Du Bois, 176 Pennsylvania, 439, 443.

In Illinois T. & S. Bk. v. Arkansas City, 40 U. S. App., 259, headnote:

"As against the bondholders who loaned their "money on a mortgage of the plant and income of "water works owned by the mortgagor, which had "been built under the direction and accepted by the "formal resolution of the city council of a city as "completed according to the terms of a defeated "ordinance upon its records, and for which the city "had paid rental without protest for fourteen months "according to the terms of this ordinance, such city "is estopped to defeat a recovery for the rents sub-"sequently accruing according to the terms of the

"ordinance, either on the ground that there was no "contract, or that the city had no power to contract "for twenty one years, or that it had no power to "grant to the water company the exclusive right to "use its streets for laying water pipes."

The court say (40 U. S. App. 293):

"There is another and a conclusive reason why this city cannot maintain any of the defenses it has interposed in this suit. It is that it cannot accept the benefits and repudiate the burdens of its contract. It is that it cannot be heard to deny the truth of the representations of the existence and of the execution of this contract which its records and its conduct have constantly made, and in reliance upon which the gas company and the water company constructed and extended the water works, and the bank and the bondholders loaned their money. No principle is more universal in the jurisprudence of civilized nations, no principle is more equitable in itself, or more salutary in its effects, than that no one may, to the damage of another, deny the truth of statements and representations by which he has purposely or carelessly induced that other to change his situation. * * * * This principle is as applicable to the transactions of corporations as to those of individuals."

And further, pp. 294-6:

"In a business transaction like that of procuring the construction of water works and the use of water for itself and its inhabitants, a municipality is subject to this principle to the same extent as a private corporation. The same rules govern its business transactions that govern the negotiations of private individuals and corporations. * * * *

"The city of Arkansas City spread upon the records of its city council an ordinance, approved by its mayor, which purported to be an offer to the gas company to pay the rentals whose recovery is sought in this suit in consideration that the company would construct and operate these waterworks. The company accepted the supposed offer, and at the expense of thousands of dollars constructed and operated the works according to the terms of the ordinance under the express direction of the city council. The city accepted the original plant by a resolution spread upon its records. * * * Bonds to the amount of $100,000 were immediately issued

and sold in open market upon the faith of this contract by the city, its performance by the mortgagor evidenced by the acceptance of the city council and by the fact that the latter had paid the rentals under it for fourteen months without protest. How can that city now be heard to say to the holders of these bonds that all these representations were false, that it had no power to make this contract, or that it never made it, or that it was never performed when it still continues to take and use the water from the hydrants? It cannot. * * * *

"But this is not all. After this mortgage was made the city council of this city by motions duly carried and resolutions properly passed accepted seventy five additional hydrants erected upon extensions of these works made under its orders, and its city clerk certified over the seal of the city that these hydrants had been erected and accepted by the city * * * and that certain rentals had accrued thereon from the city, which were sufficient in amount to pay the interest on the remaining $50,000 of bonds. These certificates were presented to the trustee under the trust deed, and in reliance upon them * * * it issued the remaining bonds, and they have been purchased by their holders. The city has used these hydrants to the present time. * * * * Upon every principle of justice and of equity it is too late now for it to deny the truth of these representations while it retains the benefits they procured for it. It must return the $50,000 and interest which its acts and conduct induced the bondholders to part with before it can be heard to say that the representations they made were false."

In National Waterworks Co. v. Kansas City, 27 U. S. App., 166, headnote: "Where for a period of over "eighteen years a city has recognized and accepted a "waterworks system as having been constructed in "full compliance with the demands of the contract "under which it was built and operated, it is too late "for the city to repudiate such recognition."

The court, per BREWER J., say (27 U. S. App., 179):

"In its cross bill the city has made claim for damages and insisted that the waterworks system does not come up in efficiency and completeness to the requirements of the contract. We agree with the Circuit Court, after reviewing carefully the testimony, that the city is not entitled to maintain this claim. It has for many

years recognized and accepted this waterworks system as having been constructed in full compliance with the demands of the contract, and it is now too late to repudiate such recognition."

(b) If the town desires to repudiate the contract the least it can do is to cease availing itself of its benefits (Cases cited above). As it is at present, although the town has repudiated the contract, yet if the Water Company should wilfully stop its works a single day it would risk the forfeiture of its charter, and if the breach of its duties were continued for any substantial period it would certainly forfeit it.

6. The cases that may be cited by the appellee are inapplicable.

They may be divided into the following classes:

(a) Cases applying the rule that where a statute authorizes a municipality to incur an expense but requires that it must be paid *exclusively* out of the proceeds of a special tax, the general funds of the municipality are exempted from its payment, and it can be paid only to the extent of the proceeds of the special tax.

Webster v. People, 98 Illinois, 343, 349–350.
Second Nat. Bk. v. Lansing, 25 Michigan, 207.
Peake v. City of New Orleans, 38 Fed. Rep., 779.
Findley v. Hull, 13 Washington, 236.

Here the hydrant rents are chargeable on the general funds of the town, if the proceeds of the two mills tax levy are insufficient to pay them.

(b) Cases holding that no obligation or liability even for the current expenses of municipalities, for wages of laborers, salaries of public officers, or any purpose whatever, is exempted from the prohibition of a constitution limiting the indebtedness which may be incurred by municipal corporations, after they have reached the debt limit.

Lake County v. Rollins, 130 U. S., 662.
Lake County v. Graham, 130 U. S., 674.

City of Springfield v. Edwards, 84 Illinois, 632–3.
French v. City of Burlington, 42 Iowa, 614.

Here the town had not contracted any indebtedness by borrowing money or issuing bonds for any purpose (p. 78), and the contract to pay hydrant rents did not create an indebtedness within the meaning of the Harrison Act.

(c) Cases holding that a contract by a town to pay water or gas rents for a term of years, relates to the necessary current expenses of the town, and does not create an "indebtedness" within the meaning of a constitutional debt limit, but that if, at the time the contract to pay water or gas rent is made, the town is indebted up to the constitutional limit, it is thereby prohibited from making any contract whereby a liability or obligation is created, even for the necessary current expenses in the administration of the affairs and government of the town.

Prince v. City of Quincy, 105 Illinois, 138, 141–3.
Prince v. City of Quincy, 105 Illinois, 215–7.
Same v. Same, 128 Illinois, 443.
City of Laporte v. Gamewell Fire Alarm Tel. Co., 146 Indiana, 466, 469–473.
Davenport v. Kleinschmidt, 6 Montana, 502, 543–5.
Read v. Atlantic City, 49 New Jersey Law, 559.
Beard v. City of Hopkinsville, 95 Kentucky, 239.
Spilman v. Parkersburg, 35 W. Va., 605.
Kiehl v. City of South Bend, 44 U. S. App., 687, 692–4.
Murphy v. East Portland, 42 Fed. Rep., 308.

(d) Cases holding that a contract by a town to pay a Water Company a yearly rent of $1,800 violates a statute forbidding the creation of any *liabilities* in any manner in excess of $1,000, and that such a contract

violates a statute forbidding the incurring of *liabilities* exceeding in any one year the revenue for such year.

Salem Water Co. v. City of Salem, 5 Oregon, 29.

Niles Water Works v. Mayor, 59 Michigan, 311.

Humphreys v. Bayonne, 55 N. J. L., 241.

(e) The cases as to the legal effect of contracts to erect a building, to buy property or to rent land. These cases have no application to the case at bar.

See Walla Walla v. Walla Walla Water Co., 172 U. S., 19.

II. Ordinances Nos. 64 and 65 impaired the obligation of the contract contained in Ordinance No. 10.

1. Ordinance No. 64 impaired the obligation of the contract.

(a) The contract was that the town agreed to pay hydrant rents of $1,962.50 every six months for twenty five years, and agreed " to levy and collect a tax suffi- " cient for the purpose of making said semi annual " payments for each and every one of the twenty five " years aforesaid " (p. 21). On March 18, 1895, in order to carry out this contract the town appropriated " Amount due the Raton Water Works Company, up to " January 1st, 1895 $4735.15." " Amount to pay " water works Co., for fire hydrants, for the year " commencing January 1st, A. D., 1895 $3,935 " (Ordinance No. 59, p. 9).

On May 23, 1895, the town board of trustees passed an ordinance repealing all but $1,500 of this appropriation, under the guise of making an appropriation " To " supply the town with water $1,500 " (p. 11) to pay $8,670.15 of hydrant rents, and at the same time changing the date of the fiscal year so as to deprive the town treasurer of all power to pay $4,735.15 of warrants that were duly issued by the town to the Water Company in payment of hydrant rent (Ordinance No. 64, pp. 11–12; Bill, p. 5; Ans., p. 14).

(b) Where a town contracts to pay hydrant rent and to levy and collect a tax sufficient to pay it for twenty five years, makes a sufficient appropriation for that purpose, and thereafter partly repeals the appropriation, the repealing ordinance impairs the obligation of the contract.

Seibert v. Lewis, 122 U. S., 284, 291, 296–300.

Von Hoffman v. City of Quincy, 4 Wall., 535, 554–5.

Nelson v. St. Martin's Parish, 111 U. S., 716.

(c) An ordinance depriving a town treasurer of power to pay warrants already lawfully issued to *bona fide* holders, which provides no other fund to pay the warrants, impairs the obligation of the contract created when the warrants were issued.

Keith v. Clark, 97 U. S., 454.
Hartman v. Greenhow, 102 U. S., 672.
Virginia Coupon Cases, 114 U. S., 271, 302-3.
McGahey v. Virginia, 135 U. S., 662.

2. Ordinance No. 65 impaired the obligation of the contract.

(a) By the law in force when ordinance No. 10 was passed it was made the duty of the town clerk to register the town warrants in the order in which they were presented and to pay them out of the town funds accordingly (New Mexico Compiled Laws 1884, §§ 1649–1650.) Ordinance No. 65 made all the town warrants issued at a date which is subsequent to that of the Water Company's warrants, receivable "in pay-"ment of all town licenses" (Ordinance No. 65, p. 12; Bill, p. 5; Ans., p. 14), thereby not only discriminating against the Water Company's warrants, but debasing the fund out of which all warrants are payable by substituting scrip for cash. The effect of this ordinance is to render any mandamus to enforce the payment of the Water Company's warrants ineffectual, since the town funds would then consist of its own warrants instead of lawful money.

(b) The debasement of a fund out of which warrants already issued are payable, by substituting scrip for lawful money, impairs the obligation of the contract created when the warrants were issued, to pay them in lawful money.

Fazende v. City of Houston, 34 Fed. Rep., 95.
Board of Liquidation v. McComb, 92 U. S., 531, 539-540.
Maenhaut v. City of New Orleans, 2 Woods, 108, 111-4.
Chaffraix v. Bd. of Liquidation, 11 Fed. Rep., 638.

III. The town had no power to impair the obligation of the contract.

1. Because it had not been authorized so to do by the Territorial Legislature.

2. Because the Territorial Legislature was forbidden by the Act of Congress organizing the Territory and by the Constitution of the United States from impairing the obligation of contracts.

(a) New Mexico was organized under an Act of Congress which expressly made its subject to the Constitution and laws of the United States.

9 U. S. Stat. at Large, p. 452; Act of September 9, 1850, § 17.

(b) Where a territory is organized expressly subject to the Constitution and laws of the United States, its legislature has no power to disregard any of the fundamental guarantees of the constitution for the protection of personal rights.

Thompson v. Utah, 170 U. S., 343, 346–350.
American Publishing Co. v. Fisher, 166 U. S., 464, 466–8.
Springville v. Thomas, 166 U. S., 707–9.
Callan v. Wilson, 127 U. S., 540, 548–551.
Reynolds v. U. S., 98 U. S., 145, 154.
Webster v. Reid, 11 Howard, 437, 460.

(c) Even Congress, in any territory formally organized by it under the Constitution, has no power to impair the obligation of contracts, except indirectly by means of a bankruptcy law, a declaration of war, an embargo, or a legal tender act.

Sinking Fund Cases, 99 U. S., 700, 718–9, 724–5.
Legal Tender Cases, 12 Wall., 547–550.
Hepburn v. Griswold, 8 Wall., 604.

IV. The bill made out a proper case for equitable relief; but even if it had not, the Territorial Supreme Court erred in dismissing it generally (p. 30), and in deciding that Ordinance No. 10, so far as it is questioned, is void; that Ordinance No. 59 and the warrants issued to the complainant are void, and that Ordinance No. 64 is valid (Certificate, p. 66; Opinion, pp. 38-9, 50), thus conclusively adjudging all the vital questions in the case in favor of the town, and thereby barring forever any new action or suit to enforce the Water Company's present claims.

1. Equitable relief is proper.

(a) This suit was brought following National Water works Co. v. Kansas City, 27 U. S. App., 165, 173-4, 179-183, and Fazende v. City of Houston, 34 Fed. Rep., 95, and it is fully covered by the authority of those cases.

(b) Specific performance of the contract contained in ordinance No. 10, at least to the extent of declaring it a valid and subsisting contract, binding and obligatory on the town, and ordering the town to pay the hydrant rentals, should have been granted.

National Waterworks Co. v. Kansas City, 27 U. S. App., 165, 173-4, 179-183.

(c) The town should have been enjoined from further breaches of the contract.

Where an ordinance debases the fund out of which warrants already issued are payable, by requiring town warrants issued after the passage of the ordinance, to be received in lieu of cash, the enforcement of the ordinance will be restrained by injunction.

Fazende v. City of Houston, 34 Fed. Rep., 95.

Board of Liquidation v. McComb, 92 U. S., 531, 539–540.
Maenhaut v. City of New Orleans, 2 Woods, 108, 111–4.
Chaffraix v. Bd. of Liquidation, 11 Fed. Rep., 638.

Where a town passes an ordinance repealing a valid appropriation previously made to pay warrants issued for prior water rents, as well as to pay current water rents, and changes the date of the commencement of the fiscal year so as to deprive the town treasurer of all power to pay not only $4,400 of warrants lawfully issued before the repealing ordinance was passed, but also depriving him of the power to pay the larger part of the water rents for the current year, the enforcement of the invalid repealing ordinance, so far at least as it restrains the town treasurer from performing the duties imposed on him by the territorial law (Compiled Laws, §§ 1649–1650), should be restrained by injunction.

Fazende v. City of Houston, 34 Fed. Rep., 95.
Board of Liquidation v. McComb, 92 U. S., 531.

" Where a party claims a franchise under a statute, " and is in the possession and enjoyment of such fran- " chise, equity will interpose to protect and secure the " enjoyment of such franchise, because it affords the " only plain and adequate remedy."

Boston Water Power Co. v. Boston & Worcester R. R. Co., 16 Pick., 525.
St. Louis R. R. Co. v. N. W. St. L. Ry. Co., 69 Missouri, 65, 71–2.
Newburgh Turnpike Co. v. Miller, 5 John. Ch., 101, 110–1.

While a court of equity may not restrain the *passage* of an invalid municipal ordinance, yet it can and should restrain the *enforcement* of an invalid ordinance, whenever vested rights granted by a prior ordinance would be thereby impaired. And this rule applies with

particular force to a case where the enforcement of an invalid ordinance violates the vested rights of a water company.

New Orleans Water Works Co. v. Rivers, 115 U. S., 674, 683.
New Orleans Gas Co. v. Louisiana Light Co., 115 U. S., 673.
Walla Walla v Walla Walla Water Co., 172 U. S., 1.
Foster v. City of Joliet, 27 Fed. Rep., 899.
Pennoyer v. McConnaughy, 140 U. S., 1.
City of Quincy v. Bull, 106 Illinois, 337.
Mayor v. Radecke, 49 Maryland, 217, 231-2.
People v. Sturtevant, 9 N. Y., 263, 273-9.

Let us test it. Suppose that during the pendency of this dispute the Water Company had threatened to shut off the water from the hydrants leased to the town, unless the town paid the back hydrant rent, or had threatened to shut off the water from a consumer unless he paid the whole of a water bill over the amount of which an honest dispute had arisen. In either case equity would grant a mandatory injunction *pendente lite*, requiring the water to be furnished pending the determination by the court in the course of the injunction suit, of the amount justly due the Water Company, on the payment of which amount a perpetual injunction would issue.

VanNest Land Co. v. New York Water Co., 7 App. Div., 295.
Sickles v. Manhattan Gas Light Co., 64 How. Pr., 33, 35-41.
Same v. Same, 66 How. Pr., 314.
Cromwell v. Stephens, 2 Daly, 15.
1 Beach on Injunctions, §§ 35, 436.
Bienville Water Supply Co. v City of Mobile, 112 Alabama, 260.
Graves v Key City Gas Co., 83 Iowa, 714; 93 Iowa 470.
Wood v Auburn, 87 Maine, 287.
American Water Works Co. State, 46 Nebraska, 195, 202-4.
Whiteman v Fuel Gas Co., 139 Pa., 492, 496-7.
Sewickley Borough School District v Gas Co., 154 Pa., 539.
Gas Co. v Gas Co., 186 Pa., 444, 454-5.

The fact that the Water Company voluntarily invoked the aid of a court of equity, should not deprive it of the rights which it would have had if it had threatened to cut off the water from the hydrants, and the town had thereupon filed a bill to enjoin it from doing so.

2 A decree dismissing a bill in an equity suit, which is absolute in its terms, and which the opinion and certificate of the court below show was made on the merits (pp. 66, 38-9, 50), is a final determination of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties.

Durant v Essex Company, 7 Wall., 107, 109–110.
Lessee of Parrish v Ferris, 2 Black, 606, 610.
Case v Beauregard, 101 U. S., 688.
2 Black on Judgments, §§ 720–2.
1 Freeman on Judgments, 4 ed. § 270.

If ordinance No. 10 and the warrants issued under it are void (Certificate, p. 66) the town is entitled to have the bill dismissed absolutely; but on the other hand if the ordinance and warrants are valid, the Water Company is entitled either to relief in equity, or at least to have the bill dismissed without prejudice to an action at law.

3. If therefore ordinance No. 10 and the warrants issued under it are valid, it was error to dismiss the bill absolutely, and the judgment must be reversed and the cause remanded, even though it should be held that the Water Company ought to have brought an action at law instead of a suit in equity.

Rogers v. Durant, 106 U. S., 644, 646.
Buzard v. Houston, 119 U. S., 347, 354.
Horsburg v. Baker, 1 Peters, 232, 237.
Barney v. Baltimore City, 6 Wall., 280, 289.
Kendig v. Dean, 97 U. S., 423, 426.
Hobson v. M'Arthur, 16 Peters, 195.
Miles v. Caldwell, 2 Wall., 45.

Rogers v. Durant, 106 U. S., 644, headnote:

"A decree of the Circuit Court, dismissing upon "the merits a bill of which this court on appeal holds "that there is no jurisdiction in equity, will be "reversed, and the cause remanded with directions to "dismiss the bill without prejudice to an action at "law, and with costs in the court below, and each "party to pay his own costs on the appeal."

The court say (106 U. S. 646):

"There being no sufficient evidence of loss, there can be no doubt that the case is one within the exclusive jurisdiction of a court of law. * * *

"The decree of the Circuit Court, dismissing the bill generally, might be considered a bar to an action at law, and should therefore be reversed, and the cause remanded with directions to enter a decree dismissing the bill for want of jurisdiction, without prejudice to the right of the plaintiff to sue at law. (Horsburg v. Baker, 1 Pet. 232; Barney v. Baltimore City, 6 Wall. 280; Kendig v. Dean, 97 U. S. 423.)"

Lastly. The decree of the Supreme Court of the Territory of New Mexico should be reversed and that of the District Court affirmed.

HENRY A. FORSTER,
Of Counsel for Appellant.

No. 272.

Reply Brf. of Statter for Appt

Supreme Court of the United States.

Filed April 10, 1899.

OCTOBER TERM, 1898.

No. 272.

THE RATON WATER WORKS COMPANY,
Appellant,

against

THE TOWN OF RATON,
Appellee.

APPELLANT'S SUPPLEMENTAL BRIEF.

HENRY A. FORSTER,
Of Counsel.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

In the Supreme Court of the United States

OCTOBER TERM, 1898.

No. 272.

THE RATON WATER WORKS COMPANY,
Appellant,

AGAINST

THE TOWN OF RATON,
Appellee.

Appellant's Supplemental brief in reply to brief and argument of appellee.

I. The agreement to pay a semi-annual hydrant rental for the term of twenty-five years is a contract relating to the current expenses of the town, and the hydrant rental agreed to be paid is partly a rent for the use of the water works system by the town and its inhabitants, but is chiefly a compensation for the water furnished to the town, none of which becomes due until the whole has been earned by the furnishing of the water for the six months for which the stipulated hydrant rental is claimed.

Walla Walla vs. Walla Walla Water Co., 172 U. S., 1, 19-21.

1. The right of a municipality to make a contract for a supply of water, gas, electricity, or for any other necessary services, arises from its duty to procure the services and supplies necessary to enable it to perform its municipal functions.

All municipalities have power to make contracts for the rendition of such services, and to pay for them when rendered out of their general revenues, unless they are restrained therefrom by clear statutory restrictions. Frequently, however, as in the case at bar, there is a statute authorizing the levy of a special tax in aid of some particular town charge, in addition to the general revenues of the town (Compiled Laws, § 1622, subdiv. 71). Where such a special tax levy is provided for it becomes the primary fund for the payment of the charge for whose benefit it was created; but, if it is insufficient for that purpose, then the residue of the charge must be paid out of the annual revenues of the town derived from general taxation and licenses. Again, as in the case at bar, there are statutes prescribing the duration of such a contract, and allowing the town, as a part of the contract, to grant an exclusive franchise to supply its inhabitants with water, gas or electricity for a limited time.

Compiled Laws, § 1622, subdivs. 67, 69.

2. A contract by a Water Company to render daily services to a town by supplying the water necessary for its daily use, and by the town to pay therefor after the water is furnished, creates an ordinary town charge for the rendition of necessary services, payable only after they have been rendered, out of the general revenues of the town, like any other item of current expenses, if the two-mill tax levy is insufficient to discharge them.

Cases cited in appellant's brief, pp. 17–20.

The appellee attempts to answer these arguments in three ways:

(a) By claiming, in substance, that the contract does not bind the town to pay the agreed hydrant rental, while it does bind the Water Company to continue to supply the town with water under the contract.

The town claims that its agreement to pay hydrant rental is void as to the excess of hydrant rental above the proceeds derived from a two-mill tax levy (Appellee's Brief, pp. 1, 6–25), while admitting that it accepted the complainant's plant (Ans., p. 13), that it has ever since possessed and used the forty-four hydrants under and by virtue of the contract (Ans., p. 14), and that it has been and now is in the possession, use and enjoyment of the water plant of the complainant (Ans., p. 15).

(b) By claiming that the town is financially unable to pay the stipulated hydrant rental (Appellee's Brief, pp. 10, 12, 22).

(c) By claiming that the decision of the New Mexican Supreme Court that the town's agreement to pay hydrant rentals, the ordinance making an appropriation for their payment, and the warrants issued by the town to pay back hydrant rentals, are null and void, and that the ordinance repealing the appropriation is valid (Certificate, p. 66), should be affirmed because it is alleged that "The appellant has a plain, speedy "and adequate remedy at law" (Appellee's Brief, p. 27).

Neither of these arguments is well founded.

II. When a town makes a contract with a water company to supply it with water for a term of years, at a stipulated hydrant rental, remains in the possession, use and enjoyment of the water plant, and requires the Water Company to continue supplying it with water under the contract (Ans., pp. 15, 14), it is liable to pay the stipulated hydrant rental so long as it remains in possession of the plant, and it cannot question the validity of the contract while availing itself of its benefits.

Cases cited on pp. 28–32 of Appellant's Brief.

1. Even if a lease is voidable for actual fraud and conspiracy on the part of the landlord, yet so long as the tenant remains in the possession and enjoyment of the demised property, it is liable to pay the stipulated rent and it cannot question the validity of the lease.

Barr vs. N. Y. L. E. & W. R. R. Co., 125 N. Y., 263, 271–2, 276–7.

In Barr vs. N. Y. L. E. & W. R. R. Co., 125 N. Y., 263, it was held that where the possession of property has been transferred under a lease induced by fraud, while the fraud furnishes ground for rescinding the lease and avoiding the obligations imposed thereby, it may not be availed of as a means of continuing possession of the property without meeting those obligations.

The court say (125 N. Y., 271):

"The question, which is raised by the defense to the action, is whether the fraudulent nature of the acts and proceedings, by which the railroad was constructed and the contract of lease effected, is a matter which has reached in its vice so far as, at this day, to disable the plaintiffs from enforcing, against the lessee of their company, the payment of the full amount of rental stipulated for in the lease. * * * There is something repugnant to our sense of justice, and a seeming subversion of ideas respecting property rights, in the position that property may be retained and enjoyed, and payment of the stipulated rental therefor refused by its holder, on the plea of fraudulent practices, or because of the immoral conduct involved in the making of the contract by which the property was transferred and the obligation to pay imposed."

And further, pages 276–7:

"I think it quite incompatible with the principles upon which equity proceeds to hold and use property, the only right to which is derived through a contract of lease, and to refuse payment of a part of the rent stipulated in the contract on the ground of the existence of fraud in its procurement."

2. A tenant is estopped from denying the title of his

landlord, and is bound to pay the stipulated rent so long as he remains in possession of the demised property.

Rector vs. Gibbon, 111 U. S., 276, 284.
Williams vs. Morris, 95 U. S., 444, 455, 458.
Stott vs. Rutherford, 92 U. S., 107, 109–10.
Lucas vs. Brooks, 18 Wall., 436, 451–2.
Woodward vs. Brown, 13 Peters, 1, 4.
Peyton vs. Stith, 5 Peters, 486, 492.

III. The town is able to pay the stipulated hydrant rental.

1. As early as 1893 its assessed valuation was $807,230 (Ans., p. 16); it had no municipal debt up to the time the action was commenced (p. 78), and although allowed to levy a property tax of ten mills on the dollar for municipal purposes (Compiled Laws, 1884, § 1724), it conducted its municipal affairs, even during the depths of the depression caused by the panic of 1893, and by the Debs strike in 1894, on a nominal property tax rate averaging about seven mills on the dollar, of which less than two-thirds was collected, making an actual tax rate of less than five mills on the dollar (Ans., p. 16), without borrowing a dollar, issuing a bond, or creating a municipal debt (p. 78). The town was able to do this because it collected license taxes from liquor dealers, shows, peddlers, on dogs, and other sources, which sometimes exceeded the amounts collected from taxes on property.

2. The facts relied upon by the town to show that it is unable to pay the hydrant rentals only show that it is unwilling to pay them.

In 1891 it levied a municipal property tax of five mills on the dollar, of which $2,089.52 was collected, and $1,030.18 was not collected (Ans., p. 16).

In 1892 it levied a municipal property tax of eight mills on the dollar, of which $3,204.39 was collected, and $2,186.81 was not collected (Ans., p. 16).

In 1893, with an assessed valuation of $807,230, it levied a municipal property tax of six mills on the dollar, of which $2,718.83 was collected, and $2,124.55 was not collected (Ans., p. 16).

In 1894, finding that its citizens were unwilling to pay a six-mill tax, it reduced the assessed valuation to $650,620, and then levied a ten-mill tax for municipal purposes of which $3,616.52 was collected and $2,889.68 was not collected (Ans., p. 16).

A town which pays its current expenses during the panic of 1893 on a nominal tax-rate of about seven mills on the dollar, of which only about three-fifths is collected, without incurring a municipal debt (p. 78), is amply able to pay hydrant rentals for water furnished to it.

3. The answer does not allege that the town is unable to pay the stipulated hydrant rental.

(a) It merely alleges the total assessment for town purposes (of all the real and personal property within the corporate limits) during certain years, the town tax-rate assessed on real and personal property, the amount of municipal property taxes collected, and that "practically its entire revenue is derived from its tax "levy" (Ans., p. 16), but it does not allege either what taxes are included in its tax levy, the amount of licenses or occupation taxes it levies, or the amount of fees or fines that it collects.

(b) Although it appears that the town levies and collects licenses or occupation taxes, and collects fees and fines (Bill, pp. 5, 6, 7; Ordinance No. 59, p. 9; Ordinance No. 64, p. 11; Ordinance No. 65, p. 12; Ans., p. 14; Decision, p. 27; Certificate, p. 64), there is no allegation as to their amount.

(c) A plea by a town that its revenue is insufficient to discharge its obligations should set forth in detail

what its revenue consists of. A mere allegation that the revenue received from property taxes, two-fifths of which are not collected, is less than the amount of the town's obligations, is wholly insufficient. It may have other sources of revenue as is the case here.

Chicago vs. Wellman, 143 U. S., 339, 343–6.

(d) Towns in the South and Southwest derive a large part of their municipal revenue from licenses or occupation taxes.

Osborne v. Mobile, 16 Wall., 479, 481–2.
Machine Co. v. Gage, 100 U. S., 676–9.
Robbins v. Shelby Taxing District, 120 U. S., 501–2.
Postal Tel. Cable Co. v. Charleston, 153 U. S., 692, 694–9.
Emert v. Missouri, 156 U. S., 296.
Osborne v. Florida, 164 U. S., 650.

Moreover, in towns in the Southwest property is usually assessed for taxation at about a third of its market value (67 Supplement of the Commercial and Financial Chronicle, pp. 144, 117, 129, 176; Message of the Governor of New Mexico, Jany. 16, 1899, pp. 6, 9–10, 266–7). The mere fact, therefore, that the real and personal proprety in a New Mexican town is assessed at a certain sum, is only a part of the facts that must be known before its financial condition can be determined; there should also be allegations of the amount it collects from licenses or occupation taxes, fines and fees, and of the ratio between the assessed value and the market value of the property within the corporate limits.

4. In addition to taxes on real and personal property the town also levied and collected the following licenses or occupation taxes:

Dog license, each dog or whelp, per annum $2
" " bitch, per annum $5
Wholesale liquor license, per annum $50
Soda water, mineral water, ginger ale license, per annum $25
Gambling house or bowling alley license, each table or alley, per annum $100
Retail liquor license, per annum $200
Public hall license, per annum $60
Circus license, first performance $50
" each subsequent performance $25
Side show license, each performance $10
Theatrical performance, musical entertainment, concert, sleight of hand performance license, each performance $5
Dance, fandango or public ball license, each day .. $10
Peddler's license, per annum $200
Cart or wagon license, per annum $15
Shooting gallery license, per annum $50

The Revised Ordinances of the Town of Raton, adopted by the Board of Trustees, September, 1894, impose the following licenses or occupation taxes:

"ORDINANCE No. 1. CONCERNING DOGS."

"SECTION 1. That no dog, bitch or whelp shall be allowed to run at large within the limits of this town, unless the owner or keeper of such dog, bitch, or whelp shall before the 1st day of July, in each year, pay to the Town Recorder the sum of two dollars for every dog, or whelp, and the sum of five dollars for every bitch owned or kept by such person and shall also place around the neck of such dog, bitch or whelp a collar made of durable material."

"SECTION 3. It is hereby made the duty of all persons owning or keeping any dog, bitch or whelp on or before the first day of July in each year to apply to the Town Recorder and make payment to him as required in section one, (1) of this ordinance, together with a fee of fifty cents for issuing the same, and it shall

be the duty of such Recorder to issue a license to such owner or keeper with a tag bearing the license number, which tag shall, by the owner or keeper, be attached to and worn on the collar herein provided for, and the Recorder shall keep a record of such license and pay the amount received therefor over to the Town Treasurer, together with the Recorder's fee for issuing said license, taking his receipt therefor." * * * (Revised Ordinances, p. 11).

"ORDINANCE No. 2. Relating to the Licenses of Wholesale and Retail Liquor Dealers, Manufacturers of Soda Water, and Keepers of Gaming Tables."

"SECTION 1. Hereafter no person, firm or corporation shall be engaged in, or carry on any business, trade, occupation or do any act or thing hereinafter mentioned or described until he shall have obtained a license therefor in the manner hereinafter provided."

"SECTION 4. All licenses shall be signed by the Mayor and issued by the Recorder under his hand and the official seal of the Corporation, upon payment of a fee and the receipt of the sum assessed by this ordinance for such license.

"SECTION 5. The Recorder shall keep a License Register, in which he shall enter the name of each and every person licensed, the date of the license, the purpose for which granted, the amount paid therefor, and the date when the same will expire.

"SECTION 6. All money collected for licenses by the Recorder, shall be paid over to the Town Treasurer as soon as received, taking his receipt therefor."

"SECTION 11. Every person engaged in the trade, business or occupation of wholesale liquor dealer, brewer of malt liquors, or beer-bottling establishments, shall pay an annual license of fifty dollars, and such license shall authorize the person therein named to sell, barter, give away and deliver spirituous, vinous, fermented or malt and intoxicating liquors at the place or house specified in said license, in quantities not less than five gallons."

"SECTION 13. Any person who shall be engaged in the manufacture and sale of bottled soda water, pop, sarsaparilla, ginger ale, seltzer water, or other salt, soda or mineral water bottled, shall pay an annual license of twenty-five dollars."

"SECTION 15. Any person or persons who shall keep or permit the same to be kept within the corporate limits of the town of Raton, any gambling game, such as monte, faro, pass faro, roulette, poker, wheel of fortune, hazard, chuck-a-luck, craps, or any other game of chance played with cards, dice or other device, played for money or its equivalent, or bowling alley wherein other persons are permitted to play or throw balls or bowl for money, shall pay an annual license for each and every such table or alley kept by him the sum of one hundred dollars per annum, payable quarterly in advance."

"SECTION 17. Retail liquor dealers shall pay an annual license of two hundred dollars payable quarterly, and any person who shall keep any room or place in any building, hotel or elsewhere in said town, where any spirituous, vinous, fermented, malt or other intoxicating liquors are sold, provided or furnished to casual visitors, customers or frequenters, to be drank or used in such room or place, or on the premises, shall be deemed a retail liquor dealer within the meaning of this section."

"SECTION 20. There shall be paid for each license granted or issued under the provisions of this ordinance the sums stated respectively and said sum shall be paid to the Town Recorder, and no such license shall be issued or granted until the amount required to be paid therefor, together with a fee of fifty cents for issuing the same, shall have been paid to the Recorder." (Revised Ordinances, pp. 13–15).

"ORDINANCE No. 19. Concerning Licenses of Public Halls, Traveling Performances, &c."

SECTION 2. (As amended by Ordinance No. 33, passed May 29, 1893; published June 1, 1893.)

"Licenses may be granted to the owner, manager or conductor of each public hall or building upon payment of sixty dollars per annum, payable quarterly in advance, and no theatrical show or other performance given in said hall or building shall be required to pay any additional license." * * *

"SECTION 4. Licenses may be granted upon the payment to the Recorder of his fee and the amounts herein mentioned, for each circus, or circus and menagerie the sum of fifty dollars for the first and twenty-five dollars for each subsequent performance; for each side-show or traveling exhibition traveling with a circus or menagerie, for which an extra admittance is charged, for each performance the sum of ten dollars; for theatrical performances, musical entertainments, concerts, sleight-of-hand performances, plays by traveling performers, the sum of five dollars for each performance."

"SECTION 6. All persons who allow in their houses or upon premises under their control any dance, fandango or public ball without first having obtained a license therefor as hereinafter provided shall be punished by a fine of not less than ten dollars and not more than twenty-five dollars or be imprisoned in the town prison for a period not to exceed thirty days or by both such fine and imprisonment in the discretion of the court trying the same; provided, however, that the Mayor, in his discretion, may if he see fit, grant permission for holding said dance, ball or fandango and remit or waive the license herein required.

"SECTION 7. Licenses may be granted by the Recorder and shall be signed by the Mayor and under the seal of the town and shall be issued upon payment to the Recorder of his fee and the amounts herein mentioned for each day or night on which such dance, ball or fandango is held, the sum of ten dollars" (Revised Ordinances, pp. 43–4, 64).

"ORDINANCE NO. 35. TO AMEND ORDINANCE NO. 9, RELATING TO PEDDLERS."

"SECTION 1. Any person or persons who shall temporarily bring into the town of Raton goods, wares or other class of merchandise and shall offer the same for sale at public auction, or at retail, or at private sale, and all persons who shall sell or offer for sale any goods, wares, or merchandise at retail by sample, shall pay an annual license of the sum of Two Hundred Dollars; payable quarterly in advance; provided, that nothing in this section shall be construed as to require a license for persons peddling milk, fruit, vegetables or other articles of farm produce" (Revised Ordinances, p. 65).

"ORDINANCE NO. 54. AMENDING AND REPEALING PORTIONS OF ORDINANCES NO. 37 AND 50."

SECTION 1. That any person or persons who shall run, use or keep any coal wagons, ice wagons, water wagons, express wagon, stone wagon, oil wagons and drays used in transferring goods, wares and merchandise or any other movable property to or from the railroad or from place to place within the town limits, or delivering coal, ice or water, express, or oil, or stone as used in the construction of buildings or any other use, shall pay an annual license of fifteen dollars, payable quarterly in advance, and every licensed coal wagon, ice wagon, water wagon, express wagon, oil wagon, stone wagon and dray shall have affixed on each side of said wagon or dray as aforesaid the number thereof in plain, conspicuous figures, and any person who shall run, use or keep for hire any coal wagon, ice wagon, water wagon, express wagon, oil wagon, stone wagon or dray without having the same numbered and having obtained a license as aforesaid, shall upon conviction thereof be punished by a fine of not less than five dollars nor more than twenty-five dollars or by imprisonment in the town prison or county jail for not less than five days nor more than ten days or by both said fine and imprisonment in the discretion of the court trying the case.

"SECTION 2. Any person who shall keep or allow to be kept on his premises within the Town of Raton any shooting gallery shall pay an annual license of fifty dollars, payable in advance, and any person who shall keep or allow any shooting gallery to be kept on his premises without first having obtained a license as aforesaid, shall upon conviction thereof, be punished by a fine of not less than ten dollars nor more than fifty dollars, or by imprisonment in the town prison or county jail for not less than ten nor more than twenty days, or by both such fine and imprisonment in the discretion of the court trying the case."

Revised Ordinances, p. 81.

The annual reports of the town trustees show that the amount of licenses collected nearly equals, and occasionally exceeds, the amount of property taxes collected.

The following reports of the Town Trustees for the years ending April 1, 1892, and April 1, 1893, were printed in the official town paper ("The Raton Range") for May 6, 1892, and April 6, 1893:

ANNUAL REPORT OF THE TOWN TRUSTEES OF RATON, for the fiscal year ending April 1st, 1892.

REVENUE.

Licenses, Retail Liquor	$1,750 00
" Wholesale Liquor and Soda Bottling	75 00
" Gambling	850 00
" Shows, Peddlers, etc.	112 50
" Dog	114 00
Total amount Licenses	$2,901 50
Taxes collected and paid over	2,089 52
Taxes, road	46 00
Fines and J. P. Courts	91 85
Total receipts	$5,128 87
Tax uncollected about	$935 38

DISBURSEMENTS.

Vouchers Issued	$3,515 57	
Vouchers returned paid		$3,483 07

SALARIES.

Recorder	$225 00
Marshals	700 00
Deputy Marshals	524 00
Attorney's Salary and Fees	190 00
Treasurers	100 00
Physicians	225 00
Total amount of Salaries	$1,964 00

DISBURSEMENTS.

Street Improvements and Bridges	$483 09
Street cleaning and Garbage removal	367 85
Feeding and working Prisoners and Jail expense	132 95
Hardware and Implements	103 00
Killing Dogs	67 75
Printing	120 18
Furniture and Stationery	28 25
Rent, Fuel and Lights	101 50
Translations	9 00
Election	9 00
Charity	57 75
Tax Rebate	9 80
Pound Expense	1 50
Coroner's Fee	60 00
Total Disbursements	$3,515 57

WM. TINDALL,
Mayor.

Attest :
H. W. CARR,
Recorder.

ANNUAL REPORT

OF THE

TOWN TRUSTEES OF RATON,

For the Fiscal Year Ending April 1st, 1893.

REVENUE.

Licenses, Retail Liquor	$1,550.00
" Wholesale liquor, Bottling	75.00
" Gambling	787.50
" Dog	52.00
" Shows, Dance, Peddlers, &c	400.00
Total amount Licenses	$2,864.50
Taxes collected and paid over	3,979.90
Taxes, Road	360.00
Fines and J. P. Courts	207.00
Total Receipts	$7,411.40
Balance cash on hand April 1, 1892	1,499.48
Total receipts and cash to date	$8,910.88
Taxes uncollected about	2,000.00

DISBURSEMENTS.

Vouchers issued during fiscal year	$7,867.66
Vouchers returned paid during fiscal year	8,011.99
Total amount of salaries	2,125.61
For streets, bridges and crossings	1,726.44
Sewers and sidewalks	195.67
Garbage removed	631.50
Water contract	1,925.00
Election expenses	35.50
Street and office lights	473.00
Office rent, furniture, stationery, etc	418.52
Miscellaneous	336.42
Total disbursements	$7,867.66

JOHN JELFS,
Acting Mayor.

C. D. STEVENS,
Acting Recorder.

Dated, April 3, 1893.

IV. The Territorial Supreme Court decided that the part of ordinance No. 10 containing the town's agreement to pay the hydrant rental is null and void; that ordinance No. 59, making an appropriation to pay the hydrant rental is null and void; that the warrants issued to pay the back hydrant rental are null and void, and that ordinance No. 64, which repeals the appropriation contained in ordinance No. 59, is valid and effectual (Certificate, p. 66). This decision of the highest territorial court shows that it is idle to claim that "The appellant has a plain, speedy and "adequate remedy at law" (Appellee's brief, p. 27), or that the appellant has any practical remedy at law in any court of New Mexico (Appellee's brief, pp. 25–39).

The appellee makes the extraordinary claim that the certificate made by the Territorial Supreme Court that it had decided these questions as stated above (p. 66) is "erroneous" and "incorrect" (Appellee's brief, pp. 25, 30).

This assertion comes with little grace from the appellee's counsel, inasmuch as he was a Justice of the Territorial Supreme Court at the time the case was decided and the certificate was made (p. 50) and he did not dissent therefrom, although he took part in the decision of the case (p. 50).

This certificate was made by the Territorial Supreme Court (pp. 55–78) in conformity with 18 U. S. Stat. at Large, p. 28. Such a certificate is as final and conclusive as a judgment of the Territorial Supreme Court is.

Respectfully submitted,

HENRY A. FORSTER,
For Appellant.

No. 272.

Brief of Laughlin for Appellee

IN THE SUPREME COURT

Filed Mar. 25, 1899.

UNITED STATES,

October Term, 1898.

THE RATON WATER WORKS COMPANY,
Appellant,

AGAINST

THE TOWN OF RATON,
Appellees.

Appeal from the Supreme Court of the Territory of New Mexico.

BRIEF AND ARGUMENT OF APPELLEE.

N. B. LAUGHLIN,
Counsel for Appellee,
Santa Fe, New Mexico.

NEW MEXICAN PRINTING CO., SANTA FE, N. M.

IN THE SUPREME COURT
OF THE
UNITED STATES,
October Term, 1898.

No. 272.

The Raton Water Works Company, Appellant, against The Town of Raton, Appellee.	Appeal from the Supreme Court of the Territory of New Mexico.

BRIEF AND ARGUMENT FOR APPELLEE.

The appellee contends that the decision of the New Mexico supreme court should be affirmed, on two general propositions:

First. Because the contract, Ordinance No. 10, is *ultra vires*, and void in so far as it attempts to bind the appellee town to pay more than the proceeds derived from a two-mills levy on all the taxable property within its corporate limits, each year.

Second. Because there is not any equity in the complainant's bill, in this, that the purposes of the cause of action and the prayer of the bill, is for specific performance. and on the allegations, as therein averred, the court has no jurisdiction to enforce the relief sought.

NEW MEXICO STATUTES.

Such statutes as seem to be material to a proper determination of this cause will be quoted in full under each proposition, with reference to the Compiled Laws of New Mexico of 1884.

GENERAL INCORPORATION LAW.

Section 1620. Cities and towns organized as provided in this chapter shall be bodies politic and corporate, under such name and style as they may select at the time of their organization, and may sue, or be sued, contract, or be contracted with, acquire and hold property, real and personal, have a common seal which they may change and alter at pleasure, and have such other privileges as are incident to corporations of like character or degree, not inconsistent with the laws of the territory.

Section 1621. All municipal corporations organized under this act shall have the general powers and privileges, and be subjected to the rules and restrictions granted and provided in the sections of this act.

POWERS.

Section 1622. The city council and board of trustees in towns shall have the following powers:

First. To control the finances and property of the corporation.

Second. To appropriate money for corporate purposes only, and provide for payment of debts and expenses of the corporation.

Third. To levy and collect taxes for general and special purposes on real and personal property.

Sixth. To contract an indebtedness on behalf of the city, and upon the credit thereof, by borrowing money or issuing the bonds of the city or town for the following purposes, to wit: For the purpose of erecting public buildings; for the purpose of constructing sewers for the city or town; for the purpose of the purchase or construction of water works for fire and domestic purposes; for the purpose of the construction or purchase of a canal or canals or some suitable system for supplying water for irrigation in the city or town; for the purpose of the construction or purchase of gas works for manufacturing illuminating gas, or purchasing illuminating gas, and for the purpose of supplying a temporary deficiency in the revenue for defraying the current expenses of the city or town. The total amount of indebtedness for all purposes shall not at any time ex-

ceed five per centum of the total assessed valuation of the taxable property in the city or town, except such debt as may be incurred in supplying the city or town with water and water works, and no loan for any purpose shall be made except it be by ordinance, which shall be irrepealable until the indebtedness therein provided for shall be fully paid, specifying the purposes to which the funds to be raised shall be applied and providing for the levying of a tax not exceeding *in total amount for the entire indebtedness of the city and town* (excepting such debt as may be incurred in supplying the city or town with water or water works), eight mills upon each dollar valuation of the taxable property within the city or town, sufficient to pay the annual interest and extinguish the principal for such debt within the time limited for the debt to run, which shall not be less than ten years nor more than thirty years: *And providing*, That said tax, when collected, shall only be applied to the purpose in said ordinances specified until the indebtedness shall be paid and discharged, but no such debt shall be created except for supplying the city or town with water, unless the question of incurring the same shall, at a regular election of officers for the city, be submitted to a vote of such qualified electors of the city or town as shall in the next preceding year have paid a property tax therein, and a majority of those voting upon the question, by ballot deposited in a separate ballot box, shall vote in favor of creating such debt. * * *

Sixty-seventh. They shall have power to erect water works, or gas works, or authorize the erection of the same by others; but no such works shall be erected or authorized until a majority of the voters of the city or town, voting on the question at a general or special election, by vote approve the same.

Sixty-ninth. When the right to build and operate such water and gas works is granted to private individuals or incorporated companies by said cities and towns, they may make such grants to inure for a term of not more than twenty-five years, and authorize such individuals or companies to charge and collect from each person supplied by them with water or gas, such water or gas rent as may be agreed upon between said persons or corporations so building said works and said city or town, and such cities or towns are authorized and empowered to enter into a contract with the individual or company constructing said works, to supply said city or town with water for fire purposes thereof, and for such other purposes as may be necessary for the health and safety thereof, and also with gas,

and to pay therefor such sum or sums as may be agreed upon between said contracting parties.

Section 1646. All warrants drawn upon the treasurer must be signed by the mayor, and countersigned by the clerk, stating the particular fund or appropriation to which the same is chargeable and the person to whom payable, and no money shall be drawn except as hereinafter provided.

Section 1647. All moneys received on any special assessment shall be held by the treasurer as a special fund to be applied to the payment of the improvement for which the assessment was made, and said money shall be used for no other purpose whatever unless to reimburse such corporation for money expended for such improvements.

Section 1649. Every treasurer of any incorporated city or town of this territory shall have and keep in his office a book to be called the registry of city or town orders, wherein shall be entered and set down at the date of the presentation thereof, and without any interval or blank line between any such entry and the one preceding it, every city or town order, warrant or other certificate of such town or city indebtedness, at any time presented to such town or city treasurer for payment, whether the same be paid at the time of presentation or not, the number and date of such order or certificate, the amount, the date of presentation, and the name of the person presenting the same, and the particular fund, if any, upon which the order is drawn. Every such registry of city or town orders shall be open at all seasonable hours to the inspection of any person desiring to inspect or examine the same.

Section 1650. Every fund in the hands of any treasurer of any such city or town of this territory for disbursement shall be paid out in the order in which the orders drawn thereon, and payable out of the same, shall be presented for payment.

Section 1652. Any city or town treasurer, or his deputy, who shall fail or neglect to keep such registry, or who may fail or neglect to register any warrant or certificate of indebtedness of such town or city as shall be entitled to registry, or shall neglect or refuse to pay such warrants or certificates in the said order of payments, there being then money in the treasury applicable to the payment thereof, or wherefrom the same ought to be paid, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in a sum not less than one hundred, nor more than five hundred dollars.

TAXATION.

Section 1656. The city council or board of trustees of any city or town shall have power and authority to levy taxes, the same kinds and classes upon taxable property, real, personal, and mixed, within the limits of the city or town, as are subject to taxation for territory or county purposes, in accordance with the laws of this territory.

CITIES AND TOWNS, HOW GRADED.

Section 1669. In respect to the exercise of certain corporate powers, and the duties of certain officers, municipal corporations are divided into cities and incorporated towns.

Section 1670. Every municipal corporation having a population of three thousand and upwards shall be a city, and every municipal corporation having a population of fifteen hundred shall be deemed an incorporated town.

LIMIT OF TAXATION.

Section 1724. No more than one per centum *ad valorem* shall ever be levied or collected by any corporation, organized under this act, upon the assessed value of the taxable property situate within the limits of such corporation for all purposes, and no indebtedness shall be incurred which will require any greater annual expenditure than said one per centum per annum will fully pay off and satisfy.

The cause was set down and heard on bill and answer; the bill was verified, but it expressly waived answer under oath, (trans. p. 7) in accordance with equity rule 34 promulgated by the New Mexico supreme court prescribing practice and procedure in the district courts, under the statute of the territory, to wit:

C. L. 1884, sec 521. "It is hereby made the duty of the said supreme court to ordain and establish, both for itself and the district courts, in all matters pertaining to their respective jurisdictions, all necessary rules and forms of proceeding and practice, not inconsistent with the laws of this territory."

Said rule 34 is as follows, to wit:

"If the plaintiff waives the necessity of the answer being made on the oath of the defendant, it must be distinctly stated in the bill; when the answer is put in without oath, it may be excepted to for scandal or impertinence, but not for insufficiency; and all material allegations in the bill which are not answered and admitted may be proved

by the plaintiff in the same manner as if they were distinctly put in issue by the answer, and if no replication is filed the matters of defense set up in the defendant's answer will, on the hearing, be considered as admitted by the plaintiff, although the answer is not on oath." See rules of the supreme court, in force January 1st, 1894, page 33, rule 34.

Then the material allegations in the answer, well pleaded, where no replication is filed are admitted by the plaintiff.

1 *Daniel Ch. P. & P.*, sec. 846 (5th edition).

Par. 67, section 1622 provides that:

"They shall have power to erect water works, or gas works, or authorize the erection of the same by others; but no such works shall be erected or authorized until a majority of the voters of the city or town, voting on the question at a general or special election, by vote, approve the same."

This statute is for the purpose of obtaining the will and consent of the people of the town as to whether or not they are willing to incur the expense of the special levy for taxes, as provided by statute. It gave no additional force or validity to the terms of the contract, except as to whether or not the works shall be erected, and was not a condition precedent to the validity of the ordinance.

Thompson Houston Electric Co. vs. City of Newton, 42 Fed. Rep. 723.

I.

Now, returning to the first general proposition, did the trustees of the appellee town have the power to enter into the contract made under Ordinance No. 10, so as to bind the town to levy, collect and pay, for water rents for the purposes stated in the bill of complaint, any sum in excess of the proceeds derived from a special levy of two mills on each dollar of the assessed valuation of all the property subject to taxation within the corporate limits of the town, for each year.

Our contention is that they had not any such power, and that the contract is *ultra vires* so far as the contract seeks to bind the town to pay more than the proceeds arising from the special tax of two mills, and in that it seeks to compel the town to pay any deficits out of the general revenues of the town derived from all sources whatever.

The town corporation is a creature of the statute under which it was created and organized, and it has no powers other than those given it by the statutes, and which may be conferred on it by a fair construction by the courts in accordance with the statutes.

Paragraph 71 of section 1622 provides that:

"Seventy-first. All cities and incorporated towns constructing such water or gas works are authorized to assess, from time to time, in such manner as they shall deem equitable, upon each tenement or other place supplied with water or gas, such water or gas rents as may be agreed upon by the council or trustees, or upon each vacant lot in front of which the pipes commonly called street mains, are laid, but such vacant lots as do not take water from such street mains shall not be assessed more than one-half as much as may be assessed against the same amount of frontage of lots occupied by a one story building; and gas should be charged for by the foot, and then only to such as use it, and at the regular time of levying taxes in each year, said city or town is hereby empowered to levy and cause to be collected, in addition to the other taxes authorized to be levied, a special tax on taxable property in said city or town, which tax, with the water or gas rent hereby authorized, shall be sufficient to pay the expenses of running, repairing, and operating such works; and if the right to build, maintain and operate such works is granted to private individuals or incorporated companies by such cities or towns, and said cities or towns shall contract with said individuals or companies for a supply of water or gas for any purpose, such city or town shall levy each year and cause to be collected, a special tax as provided for above, sufficient to pay off such water or gas rents so agreed to be paid to said individuals or company, or company constructing said works: *Provided, however*, That said last mentioned tax shall not exceed the sum of two mills on the dollar for any one year."

It will be observed from this paragraph that if the town

constructs its own water works, in order to pay for the same it is provided:

"And at the regular time of levying taxes in each year, said city or town is hereby empowered to levy and cause to be collected, in addition to the other taxes authorized to be levied, a special tax on taxable property in said city or town, which tax, with the water or gas rents hereby authorized, shall be sufficient to pay the expenses of running, repairing and operating such works; and if the right to build, maintain and operate such works is granted to private individuals or incorporated companies by such cities or towns, and said cities or towns shall contract with said individuals or companies for a supply of water or gas for any purpose, such city or town shall levy each year and cause to be collected, a special tax as provided for above, sufficient to pay off such water or gas rents so agreed to be paid to said individuals or company, or company constructing said works."

Now, this much of paragraph seventy-one, must be read with paragraph sixty-seven, because paragraph sixty-nine gives the authority to grant the right to an individual or company to construct such works, and paragraph seventy-one provides that the water rents shall be paid for from the income from the consumers of the water and a special tax, and if no further provisions were made the contention of the appellant might be correct, and if the special tax collected, with incomes from the consumers, were insufficient to pay off the water rents contracted for, then resort might be had to the general funds, or to an additional levy; but this contention is repelled by the proviso to paragraph seventy-one, as follows, to wit:

"*Provided, however,* That said last mentioned tax shall not exceed the sum of two mills on the dollar for any one year."

This proviso is a clear inhibition on the town trustees from contracting to pay any more than the proceeds of the two mill levy.

It would not be contended that if the town had constructed the water works it could have levied and collected to pay the expenses of running, repairing and operating such works, anything but the special tax provided for, it could

not have drawn on the general fund for deficiencies; and it is not fair to presume that the legislature intended to grant any other or more liberal terms to an individual or incorporated company than it intended to grant the inhabitants of the town; because paragraph seventy-one says when the right to construct such works shall be granted to individuals or company there shall be levied and collected each year, "a special tax as provided for above, sufficient to pay off such water or gas rent so agreed to be paid to said individual or company," etc. The legislature was careful to specially use the words a special tax "sufficient to pay off such water or gas *rents* so agreed to be paid to said individuals or company," showing that the "water *rents*" were the particular objects the legislature had in mind.

It will be observed from paragraph six, section 1622, that the limit of taxation for all purposes "in total amount for the entire indebtedness of the city or town (excepting such debts as may be incurred in supplying the city or town with water or water works), is eight mills upon each dollar valuation of the taxable property within the city or town." * * * This, with the two mills special tax provided for in paragraph seventy-one to pay for water rents, runs up to the full limit of taxation for all purposes.

The exception in this paragraph applies to the construction and ownership of water works by the town, or to the supplying of the same with water, and gives the town the option of so doing by creating an indebtedness, or to contract for water, as it did, and leaves a margin between the eight mills and the highest limit, to enable the town to pay water rents, the cost of construction to be paid for by bonds or otherwise.

Section 1724 provides that:

"No more than one per centum *ad valorem* shall ever be levied or collected by any corporation, organized under this act, upon the assessed value of the taxable property situate within the limits of such corporation for all purposes, and no indebtedness shall be incurred which will require any greater annual expenditure than said one per centum will fully pay off and satisfy."

This statute fixes a limit of indebtedness beyond which the town trustees could not go; they had no original authority to contract any indebtedness for any purpose which would require more than the proceeds derived from a levy of one per centum on the valuation of all taxable property within their corporate limits. And when the word "indebtedness" is used here, an indebtedness for current annual expenses is meant, and not a bonded indebtedness as applied to corporate securities, and that class of corporate indebtedness.

It is certified (trans. p. 66) that the total taxes collected for 1894, on a ten mill levy, the full limit allowed by law, on all the taxable property in the town, was $3,616.52; and this was the largest sum collected during any one year from the granting of the franchise to appellant to the bringing of this suit, which sum was insufficient to pay the water rents for that year. It also appears from the answer (trans. p. 16) and it is so certified (trans. p. 65) that practically the entire revenue for all corporate purposes of the town is derived from its tax levy on the taxable property. It thus appears that there never was in any one year during the existence of this contract, ordinance No. 10, sufficient revenue collected by the town to pay the full amount of the water rents agreed to be paid, thus leaving the town without any money to pay any other of its courrent expenses, and a deficit besides. The legislature never could have intended this.

It appears in the answer (trans. p. 66).

"That under the law the defendant, The Town of Raton, paid complainant each year the full proceeds of two mills tax levy authorized by law for water rent; that in 1892 it paid complainant the sum of nineteen hundred and twenty-five dollars; in 1893 the sum of eighteen hundred dollars; in 1894 the sum of sixteen hundred dollars, and for 1895 it has under ordinance "No. F," hereinbefore referred to, levied said special tax of two mills on each dollar of taxable property to meet complainant's water rent; that under the law the total amount appropriated for any purpose for any fiscal year cannot exceed the probable amount of revenue for that year, and that its appropriation of fifteen hundred

dollars in said ordinance "No. F" for complainant's benefit for the year 1895 is a full compliance for the complainant's legal demand under said contract marked complainant's exhibit "A," as likewise amounts paid for in 1892, 1893 and 1894 are in full of all that complainant can in equity and good conscience demand under its contract with the defendant. Defendant, further answering, shows that said alleged semi-annual rental of one thousand nine hundred and sixty-two dollars and fifty cents claimed by complainant is far in excess of the amount derivable from a two-mills tax levy on the assessed value of property subject to taxation within said Town of Raton, and that said rental, so far as it is in excess of the proceeds of said tax levy, is illegal, inoperative and void."

It has been seen, by paragraphs six and seventy-one, section 1622, and by section 1724, that the full limit which the appellee's trustees were authorized to levy and collect in any one year is ten mills on each dollar on all the taxable property within its corporate limits; and by section 1636, the limitation is:

"Nor shall the total amount appropriated exceed the probable amount of revenue that will be collected during the fiscal year."

Hence, there is a limitation as to the total levy for all purposes; a limitation as to the special levy for water rents, and a limitation as to the appropriations which shall not exceed the probable amount of revenue to be derived from such levies.

By section 1638, it is provided that:

"No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof, and no expense shall be incurred by any of the officials or departments of the corporation, whether the object of expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made, except as herein otherwise expressly provided."

We have before seen that the appropriations for general purposes are limited to eight mills on the dollar, and for water rents to two mills on the dollar (paragraphs six and seventy-one, sec. 1622), making the full limit of ten mills for all purposes. This is all the board of trustees could

levy under this act for any and all purposes, for annual current expenses; and they were expressly prohibited from entering into any contract which would require any greater appropriation for any purpose, by section 1638.

It is certified by the court below, and it is not denied that practically all the revenues of the town are derived from taxes; and that the proceeds derived from the total levy of ten mills is insufficient to pay the water rents contracted to be paid by the appellees's trustees; and they are powerless to comply with the terms of payment in their alleged contract (ordinance No. 10), even if they should disregard and decline to pay any other of the town's legal obligations in the way of current annual expenses, as shown by the record in this cause.

These statutes were public notice to both the trustees of appellee, and to the representatives of the appellant, when the contract was entered into, and both parties are bound by the statutes of the territory in force at the time, and under which they acted.

"Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued."

United States vs. Macon County, 99 U. S., 582.
Coler vs. City of Cleburne, 131 U. S., 162.
Buchannan vs. Litchfield, 102 U. S., 728.
Lake County vs. Graham, 130 U. S., 674.

AUTHORITIES.

It is insisted that the following authorities sustain the construction of the foregoing statutes contended for by appellee.

This court held in *United States vs. Macon County,* 99 U. S., 582:

"Thus, while the debt was authorized, the power of taxation for its payment was limited, by the act itself and the general statutes in force at the time, to the special tax designated in the act, and such other taxes applicable to the subject as then were or might thereafter by general or special acts be permitted. No contract has been impaired by taking away a power which was in force when the bonds were issued. The general power of taxation to pay county

debts is as ample now as it was when the railroad company was incorporated and the debt was incurred. The difficulty lies in the want of original power. While there has, undoubtedly, been great recklessness on the part of the municipal authorities in the creation of bonded indebtedness, there has not unfrequently been gross carelessness on the part of purchaser when investing in such securities. Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued. If the statute gives no power to make the bond, the municipality is not bound. So, too, if the municipality has no power, either by express grant or by implication, to raise money by taxation to pay the bond, the holder cannot require the municipal authorities to levy a tax for that purpose. If the purshaser in this case had examined the statutes under which the county was acting, he would have seen what might prove to be difficulties in the way of payment. As it is, he holds the obligation of a debtor who is unable to provide the means of payment. We have no power by *mandamus* to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation. In this case it appears that the special tax of one-twentieth of one per cent. has been regularly levied, collected, and applied, and no complaint is made as to the levy of the one-half of one per cent. for general purposes. What is wanted is the levy beyond these amounts, and that, we think, under existing laws, we have no power to order."

In *Buchannan vs. City of Litchfield*, 102 U. S., 272, in passing on a constitutional limitation prohibiting an indebtedness of more than five per centum on the assessed valuation of the taxable property within the corporate limits of the city, this court said:

"The first and most important of the certified questions involves the construction of the foregoing section and article of the state constitution.

"The words employed are too explicit to leave any doubt as to the object of the constitutional restriction upon municipal indebtedness. The purpose of its framers, beyond all question, was to withhold from the legislative department the power to confer upon municipal corporations authority to incur indebtedness in excess of a prescribed amount. The authority, therefore, conferred by the act of April 15th, 1873, to incur indebtedness in the construction and maintenance of a system of water works, could have been law-

fully exercised by a city, incorporated town or village, only when its liabilities, increased by any proposed new indebtedness, would be within the constitutional limit. No legislation could confer upon a municipal corporation authority to contract indebtedness which the constitution expressly declared it should not be allowed to incur. *Law vs. People,* 87 Ill., 385; *Fuller vs. Chicago,* 89 Ill., 282.

"If, therefore it appears by evidence of which the city may rightfully avail itself, as against a *bona fide* holder for value of the coupons in suit, that the bonds, issued January 1, 1874, created an indebtedness in excess of the amount to which municipal indebtedness is restricted by the constitution, there would seem to be no escape from the conclusion that the bonds are void for the want of legal authority to issue them at the time they were issued."

It is true that in this case the question involved was as to an excess of a bonded indebtedness over a constitutional limitation, yet the principle is the same, that is, the power in the municipal officers to enter into a contract in contravention of a constitutional limitation, in the case at bar in contravention of a statutory limitation, and as the territory has no organic law, except the acts of congress, the same force and effect should be given its statutes when not in conflict with the constitution or laws of the United States, as are given to the constitutions and statutes of states. In that case (*Buchannan vs. Litchfield, supra*) the plaintiff in error was a *bona fide* holder of the bonds for which he had paid his money; in the case at bar, so far as the record shows, the warrants outstanding are in the hands of the original parties, and all the interests involved in this action are for the benefit of the original parties to the contract, and the principle of innocent holders for value, can not apply.

Again, in passing on these Litchfield city bonds, in *City of Litchfield vs. Ballou,* 114 U. S., 190, in commenting on the constitutional limitation, this court said:

"The language of the constitution is that no city, etc., 'shall be allowed to become *indebted in any manner or for any purpose* to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property.' It shall not *become indebted.* Shall

not incur any pecuniary liability. It shall not do this in *any manner;* neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any *purpose;* no matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt, in any manner, or for any purpose whatever. If this prohibition is worth anything it is as effectual against the implied as express promise, and is as binding in a court of chancery as a court of law."

And again, this court said, in *Nashville vs. Ray,* 86 U. S., 468:

"A municipal corporation is a subordinate branch of the domestic government of a state. It is instituted for public purposes only; and has none of the peculiar qualities and characteristics of a trading corporation, instituted for purposes of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities, and its powers are different. As a local governmental institution, it exists for the benefit of the people within its corporate limits. The legislature invests it with such powers as it deems adequate to the ends to be accomplished. The power of taxation is usually conferred for the purpose of enabling it to raise the necessary funds to carry on the city government and to make such public improvements as it is authorized to make. As this is a power which immediately affects the entire constituency of the municipal body which exercises it, no evil consequences are likely to ensue from its being conferred; although it is not unusual to affix limits to its exercise for any single year. The power to borrow money is different. When this is exercised the citizens are immediately affected only by the benefit arising from the loan; its burden is not felt till afterwards. Such a power does not belong to a municipal corporation as an incident of its creation. To be possessed it must be conferred by legislation, either express or implied. It does not belong, as a mere matter of course, to local governments to raise loans. Such governments are not created for any such purpose. Their powers are prescribed by their charters, and those charters provide the means for exercising the powers; and the creation of specific means excludes others. Indebtedness may be incurred to a limited extent in carrying out the objects of the incorporation. Evidences of such indebtedness may be given to the public creditors. But they must look to and rely on the legitimate mode of raising the funds for its payment. That mode is taxation."

It is contended by appellee, that where there is a plain limitation found in a constitution or a statute, on the power to levy taxes, that the municipality organized under such constitution or statute, the municipal authorities and all persons dealing with them are bound by such limitations; and any contract entered into in violation of such limitation is void to the extent of such excess of power so exercised; and that such municipal corporations possess no power to enter into contracts in excess of powers contained in the grant, expressly or by fair implication.

Dixon County vs. Field, 111 U. S., 83.
Lake County vs. Rollins, 130 U. S., 662.
Laks County vs. Graham, 130 U. S., 674.

The City Council of the City of York, State vs. Babcock, 20 Neb., 522, by a vote, agreed to issue bonds for the construction of water works, and the proposition was submitted to and voted for by the electors of the city under a statute similar to the New Mexico statutes, and the court, in passing on the statute, said:

"Second. The second question is a more serious one. The assessed valuation of the City of York was the sum of $335,000. The vote authorized the issue of and it is now sought to compel the defendant to certify bonds to the amount of thirty thousand dollars, bearing interest at the rate of six per centum per annum. The statute limits the levy 'of tax for water works to an amount not exceeding five mills on the dollar in any one year on all the property within such city or village, as shown and valued upon the assessment rolls.' This is a limitation upon the power of the city council beyond which they have no authority to issue bonds. *Hamlin vs. Meadville,* 6 Neb., 227; *Reineman vs. C., C. & B. H. R. R. Co.,* 7 Neb., 314. This point is not insisted on by the defendant, but the fact is apparent upon the face of the record, and is thus brought to the attention of the court. It is apparent that the issue is in excess of the power of the city council, and that the defendant was justified in refusing to certify the same.

"The writ must therefore be denied."

Law vs. People, 87 Ill., 385.

PAYMENT OUT OF GENERAL FUNDS.

The appellee does not deny the force of the *proviso* in paragraph seventy-one, but insists that any deficiency in the amount due for water rents should be paid out of the general funds derived from all sources. This, appellee contends, canot be done, because the statutes governing the appellee corporation forbid it.

STATUTES.

(Ordinances.)

"Section 1623. Municipal corporations shall have power to make and publish, from time to time, ordinances not inconsistent with the laws of the territory, for carrying into effect or discharging the powers and duties conferred by this act, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of such corporation and the inhabitants thereof, and to enforce obedience to such ordinances by fines not exceeding three hundred dollars, or by imprisonment not exceeding ninety days, by suit or prosecution before any justice of the peace within the limits of such city or town."

APPROPRIATIONS AND EXPENDITURES.

"Section 1636. The fiscal year of each city or town organized under this act shall commence on the first day of April in each year, or at such other time as may be fixed by ordinance. The city council of cities and board of trustees in towns shall, within the last quarter of each fiscal year, pass an ordinance to be termed the annual appropriation bill for the next fiscal year, in which such corporate authorities may appropriate such sum of money as may be deemed necessary to defray all expenses and liabilities of such corporation, and in such ordinance shall specify the objects and purposes for which such appropriations are made and the amounts appropriated for each object or purpose. No further appropriations shall be made at any other time within such fiscal year, unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city or town. either by a petition signed by them, or at a general or special election duly called therefor. Nor shall the total amount appropriated exceed the probable amount of revenue that will be collected during the fiscal year.

"Section 1637. Neither the city council nor the board of

trustees, nor any department or officer of the corporation, shall add to the corporation expenditures in any one year anything over and above the amount provided for in the annual appropriation bill of that year, except as is herein otherwise specially provided; and no expenditures for an improvement to be paid for out of the general fund of the corporation shall exceed in any one year the amount provided for such improvement in the annual appropriation bill: *Provided, however*, That nothing herein contained shall prevent the city council or board of trustees from ordering by a two-thirds vote, any improvement, the necessity of which is caused by any casualty or accident, happening after such annual appropriation is made.

"Section 1638. No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof, and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made, concerning such expense, except as herein otherwise expressly provided."

TREASURER.

"Section 1640. The treasurer shall receive all moneys belonging to the corporation, and shall keep his books and accounts in such manner as may be prescribed by ordinance; and such books and accounts shall always be subject to the inspection of any member of the city council or board of trustees.

"Section 1641. He shall keep a separate account of each fund or appropriation, and the debts and credits belonging thereto.

"Section 1642. He shall give every person paying money into the treasury a receipt therefor, specifying the date of payment and upon what account, paid, and he shall also file statements of such receipts with the clerk at the date of his monthly reports.

"Section 1643. He shall, at the end of each and every month, and oftener if required, render an account to the city council or board of trustees, or such officer as may be designated by ordinance, showing the state of the treasury at the date of such account and the balance of the money in the treasury. He shall also accompany such accounts with a statement of all moneys received into the treasury, and on what account, during the preceding month, together with all warrants redeemed and paid by him, which said warrants, with any and all vouchers held by him, shall be delivered to the clerk and filed with his said account in the

clerk's office upon every day of such statement. He shall return all warrants paid by him, stamped or marked, Paid. He shall keep a register of all warrants redeemed and paid, which shall describe such warrants and show the date, amount, number, the fund from which paid, and the name of the person to whom, and when paid."

It will be observed by section 1623, *supra,* that it is made a criminal offense to violate an ordinance; and by section 1636, *supra,* it is made the duty of the trustees of appellee to

"Pass an ordinance to be termed the annual appropriation bill for the next fiscal year, in which such corporate authorities may appropriate such sum of money as may be deemed necessary to defray all expenses and liabilities of such corporation, and in such ordinance shall specify the objects and purposes for which such appropriations are made and the amounts appropriated for each object or purpose. * * *"

This provides that appropriations shall be made for specific purposes, named in the ordinance so making them; and the board of trustees are prohibited from making any expenditures for anything over and above the annual appropriations for specific purposes named (Sec. 1637, *supra;* and they are prohibited from contracting or incurring any indebtedness or obligations not provided for by previous appropriations (Sec. 1638, *supra*). The treasurer "shall keep a separate account of each fund or appropriation, and the debts and credits belonging thereto" (Sec. 1641), and all warrants drawn upon the treasurer must state the particular fund or appropriation to which the same is chargeable, and no money shall be drawn, except as provided (Sec. 1646); and all moneys received on special assessments must be held by the treasurer as a special fund and applied only for the special purposes for which the assessment was made (Sec. 1647).

Reading all these statutes together, there is but one conclusion, that is: That the corporate authorities of appellee have no authority in law to pay any deficiency over and above the proceeds of a two-mill special levy, out of the general funds for water rents.

It is observed (Trans. p. 9) that special appropriations were made by the trustees for the purposes named, and the appellee contends that the appropriations for $4,735.15 for outstanding warrants issued for previous deficiencies of water rents, and the appropriation of $3,935.00 in excess over the proceeds of the two-mills levy were beyond the power of the board of trustees, and in this proceeding void to that extent.

AUTHORITIES.

"This prohibition was manifestly intended to limit the power of the general assembly, municipalities and all others, in the creation of indebtedness by these bodies to the amount named, and they cannot, either separately or jointly, transcend that limit. It is the command of the supreme power of the state, and it must be obeyed. * * *

"It is said that to so hold will work great hardship and injustice on the holders of these certificates of indebtedness. The same may be frequently said of any other persons who violate the law, or act contrary to its provisions. The persons loaning this money did it in the face of this constitutional provision, and the prohibition contained in the 62d section of the charter. The law is, and all persons are presumed to know it, that municipal bodies can only exercise such powers as are conferred upon them by their charters, and all persons dealing with them must see that that body has power to perform the proposed act. Such corporations are created for governmental and not for commericial purposes.

"But should it work hardship to individuals, that by no means warrants the violation of a plain and emphatic provision of the constitution. The liberty of the citizen, and his security in all his rights, in a large degree depend upon a rigid adherence to the provisions of the constitution and the laws, and their faithful performance. If courts, to avoid hardships, may disregard and refuse to enforce their provisions, then the security of the citizen is imperiled. Then the will, it may be the unbridled will, of the judge, would usurp the place of the constitution and the laws, and the violation of one provision is liable to speedily become a precedent for another, perhaps more flagrant, until all constitutional and legal barriers are destroyed, and none are secure in their rights. Nor are we justified in resorting to strained construction or astute interpretation, to avoid the intention of the framers of the constitution, or the statutes adopted under it, even to relieve against individual or local

hardships. If unwise or hard in their operation, the power that adopted can repeal or amend, and remove the inconvenience. The power to do so has been wisely withheld from the courts, their functions only being to enforce the laws as they find them enacted.

"Nor is there any force in the consideration that to enforce these provisions will occasion inconvenience to the city officials in administering its governmental affairs. It is true, they can, as all must know, only exercise the powers conferred by the charter, in the mode prescribed therein, by their ordinances. Neither a city nor any of its officers has any inherent power in governing it, but all of their powers are delegated and limited by the charter and ordinance adopted in pursuance thereof, and to carry such delegated powers into effect; and the question with us and the city authorities is, not what would be the most suitable powers to be conferred, but what have been granted." *Law vs. people,* 87 Ill., 389.

City of Springfield vs. Edwards, 84 Ill., 626.

In commenting on the powers of municipal authorities to levy and collect general and special taxes, the supreme court of Illinois, in *Webster vs. People,* 98 Ill., 343, 349, said:

"When the statute prescribes a mode and purpose of taxation, it must be pursued, and no other mode or purpose can be substituted by officials exercising the power. When a general tax is authorized, and the rate or per cent. is prescribed, the tax cannot be raised by special taxation, nor can the rate be exceeded. So, a grant of power to impose a special tax or a special assessment for local improvements, confers no power to accomplish the purpose by general tax. The power must be strictly pursued, when called into exercise."

Prince vs. City of Quincy, 105 Ill., 138; and
Prince vs. City of Quincy, Id. 215.

A case almost the same as the one at bar is *Read vs. Atlantic City,* 49 N. J. L., 558, 562, in passing on the power of the municipal authorities to enter into a contract to supply the city with water, that court said:

"There has been no expenditure of public money, and none was contemplated. The enterprise, though of public utility, has yet nothing of a public or even quasi-public nature. The company with which the contract was made was

a private corporation, organized and investing its capital for purposes of gain. The contract with the city relates to a supply of water for public purposes, but it differs in no respect from any contract the company might make with a private individual for the supply of water at a specified price. The company expended its money in erecting its water works, in the expectation of reaping a reward through the compensation it should receive for supplying water, under this and similar contracts. But it had no right to rely on this contract if the city had no authority to make it. Whoever deals with a corporation is in general presumed to know the extent of its powers."

Murphy vs. East Portland, 42 Fed. Rep., 308.

It appears (Trans. p. 66) that the total assessment for 1894, of appellee, was $650,620, and that the full limit of ten mills on the dollar produced $3,616.52; and it is further certified (Trans. p. 65) that practically the entire revenue of appellee town is derived from its tax levy. It also appears (Trans. pp. 9 and 10) that the appropriations attempted to be made under ordinance No. 59, for the years 1895 and 1896 amounted to about $14,000.00, and there is nothing to show that taxable property within appellee's corporate limits had increased to any extent over the previous year, 1894.

These attempted appropriations were excessive, and contrary to section 1636, which says:

"Nor shall the total amount appropriated exceed the probable amount of revenue that will be collected during the fiscal year."

Sullivan et als. vs. City of Leadville, 18 Pac. Rep., 736-8.

When the appellant entered into the contract with the appellee, it became the duty of the contracting parties thereto to consided paragraph seventy-one of section 1622, in making the contract, ordinance No. 10, and both paragraph seventy-one and ordinance No. 10 should have constituted the contract; and the contract should have been so entered into in contemplation of a special tax; but as the town agreed to pay a lump sum which amounted in the

aggregate to more than the proceeds of a special two-mills levy, the contract to that extent was and is *ultra vires.*

In construing a similar statute, the supreme court of Montana, in *State vs. City of Great Falls,* 49 Pac. Rep., 15, said:

"This law was in force when ordinance No. 17 was passed, approved and accepted. We are of the opinion that this law became a part of the contract embodied in said ordinance, and that the relator had a right to insist that, in so far as might be necessary to pay what was due it for hydrant rentals in accordance with the rates prescribed in the ordinance contract, a specitl tax, as provided for in that act, should be levied annually; of course, in only such sums as would be needed, and not exceeding the five mill limit. The contract was entered into in contemplation of a special fund being created by the city to meet liabilities incurred thereunder; and the legislature, in said act, contemplated at the time that cities of the territory should pay for water used by them for sewerage and fire purposes from taxes levied and collected for that special purpose."

This case was founded on a city ordinance the same as ordinance No. 59 here sought to be enforced, in which the city council of Great Falls attempted to set aside a specific sum for water rents, and that court held it could not be done, but must levy, collect and pay water rents out of a specific fund, as provided by statute.

Second Nat. Bank vs. Lansing, 25 Mich., 207.
Findley vs. Hull, 13 Wash., 236.
Salem Water Works Co. vs. City of Salem, 5 Oregon, 29.
Niles Water Works Co. vs. Mayor, 59 Mich., 311.
Humphreys vs. Bayonne, 55 N. J. L., 241.

It is contended by appellant that the statutes of New Mexico relating to municipal corporations was taken from the Iowa statutes on the same subject. This is erroneous, our statutes being copied, almost entirely, from the Colorado statutes, as shown, for example, by the compiled laws of that state, 1883, and the legislature of New Mexico (session 1884) even retained under the head "Powers," the

same paragraphs by number, to wit, p. 973, General Statutes State of Colorado:

"Seventy-first. All cities and incorporated towns constructing such water or gas works are authorized to assess, from time to time, in such manner as they shall deem equitable, upon each tenement or other place supplied with water or gas, such water or gas rents as may be agreed upon by the council or trustees, or upon each vacant lot in front of which the pipes commonly called 'street mains' are laid, but such vacant lots as do not take water from such 'street mains' shall not be assessed more than one-half as much as may be assessed against the same amount of frontage of lots occupied by a one-story building; and gas should be charged for by the foot, and then only to such as use it; and at the regular time of levying taxes in each year, said city or town is hereby empowered to levy and cause to be collected, in addition to the other taxes authorized to be levied, a special tax on taxable property in said city or town, which tax, with the water or gas rents hereby authorized, shall be sufficient to pay the expenses of running, repairing and operating such works; and if the right to build maintain and operate such works is granted to private individuals or incorporated companies by such cities or towns, and said cities or towns shall contract with said individuals or companies for a supply of water or gas for any purpose, such city or town shall levy each year and cause to be collected a special tax as provided for above, sufficient to pay off such water or gas rents so agreed to be paid to said individuals or company constructing said works: *Provided, however,* That said last mentioned tax shall not exceed the sum of three mills on the dollar for any one year."

And appellee contends that the construction by the supreme court of that state on the statutes with respect to limitations on powers to contract and levy for municipal purposes are in harmony with appellee's contention here.

Sullivan vs. City of Leadville, 18 Pac. Rep., 736.
People vs. May, 10 Pac. Rep., 641.
Town of Durango vs. Pennington, 7 Pac. Rep., 14.
Lake County vs. Rollins, 130 U. S., 662.
Lake County vs. Graham, 130 U. S., 674.
Gas Company vs. Leadville, 9 Colo., Ct. App., 400.
Leadville Water Co. vs. Leadville, 22 Colo., 297.

It is contended by appellant that the contract entered

into under ordinance No. 10 is violated by ordinance No. 64; and it is certified (Trans. p. 66) that "ordinance No. 59 referred to by complainant in exhibit 'E' was and is void and inoperative, and that ordinance No. 64, referred to by complainant in exhibit 'F' was and is valid and in full force."

This finding is erroneous. What the territorial supreme court did decide is, to wit:

"The trustees of the defendant town corporation had no authority to enact and enforce ordinance No. 64, passed May 23d, 1895, so as to in any manner change or affect the appropriations then existing for that fiscal year as provided for by ordinance No. 59, enacted in March, 1895, for the fiscal years 1895 and 1896, and it is therefore void to that extent."

Section 1636 is quoted, and the court says:

"Ordinance No. 59 seems to have been passed in accordance with this statute, and should not be permitted to be changed, so far as its appropriations are legal, by ordinance No. 64, which seems to have been passed on May 23d, 1895, after the time provided by statute."

II.

Recurring to the second proposition, that is, that there is not any equity in complainant's bill, because the principal object sought is specific performance, and on the allegations as therein averred. the court has no jurisdiction to enforce the relief prayed for.

The real purpose of this cause is to require appellee to pay to appellant $4,735.00 in outstanding town warrants issued to it as acknowledgments for delinquent water rents alleged to be due to it, and to enforce the further payments as they may become due in the future (Trans. p. 7).

"And that the said defendant may be decreed specifically to perform the said contract and agreement entered into with your orator as aforesaid, and to pay the amounts of said rental of said hydrants, which has heretofore accrued and become payable, and which may hereafter accrue and become payable, in pursuance of the terms of said contract and agreement."

The case of *Carter et al. vs. United Ins. Co.*, 1 Johns. Ch., (N. Y.), 463, was one in which plaintiffs, as assignee, filed their bill to enforce the payment of an insurance policy, alleging a total loss, and on a demurrer for want of equitable jurisdiction, it was sustained on the ground that the action was cognizable at law, and the opinion is as follows, to wit:

"The Chancellor. The demand is properly cognizable at law, and there is no good reason for coming into this court to recover on the contract of insurance. The plaintiffs are entitled to make use of the names of Gibbs and Titus, the original assured, in the suit at law; and the nominal plaintiffs would not be permited to defeat or prejudice the right of action. It may be said here, as was said by the chancellor in the analogous case of *Dhegetoft vs. London Assurance Company*, Mosely, 83, that it this rate, all policies of insurance would be tried in this court. In that case the policy stood in the name of a nominal trustee, but that was not deemed sufficient to change the jurisdiction; and the demurrer to the bill was allowed, and the decree was afterwards affirmed in parliament. 3 Bro. P. C., 525. The bill in this case states no special ground for equitable relief, nor is any discovery sought which requires an answer. Bill dismissed, with costs."

And the case of *Phyfe vs. Wardell et al.*, 2 Edwards Ch. (N. Y.), 47, in which plaintiff filed his bill in order to compel payment of purchase money and obtain *specific performance* of a contract, and in commenting on the relief sought to enforce the contract by *specific performance*, the vice-chancellor said:

"The question then is whether this is such an agreement as equity will aid a party in enforcing. There would be no necessity for resorting to this court if the only object of the bill were to recover payment of a sum of $2,650. A court of law could afford an adequate remedy; and as a general rule equity does not interfere to decree a specific performance of contracts, except where the legal remedy is inadequate or defective, and where something remains to be done over and above the mere payment of money."

The case of *Pierce et al. vs. Plumb*, 74 Ill., 326, was one in which plaintiffs attempt to enforce the conditions in a

bond; the bill was for specific performance, and the court said:

"The transactions between the parties, as evidenced by the writings entered into at the time, was a sale of the interest and property of complainants, for which Plumb gave his bond conditioned to pay the debts of complainants to the amount of $60,000."

"The decree in equity would be but to pay the money, and a judgment at law for it would seem to be of equal avail. It may be stated as one of the rules on this subject, that equity will not decree specific performance, unless something more is to be done by it than mere payment of money, or anything which ends in the mere payment, because the law is adequate to this. 2 Pars. on Cont., 523."

It is true other grounds for relief are alleged and sought for in the prayer of the bill, but they are all decided by the court below in favor of appellant, as will appear by reference to that opinion, and as will more fully appear hereafter.

22 Am. and Eng. Ency. of Law, 997, and cases there cited.

2 Story's Eq. Jur., secs. 712-719.

The appellant has a plain, speedy and adequate remedy at law as to all warrants issued and registered in compliance with the statute and ordinances, in an action for money had and received to the use and benefit of plaintiff, if the contract is valid; and by mandamus to compel a levy sufficient to pay any judgment obtained; and with respect to the amounts due or to become due in future, it could compel by mandamus the issuing and registering of warrants, or obtain judgment in the same manner. This question was raised directly by the answer (Trans. p. 17):

"And this defendant submits to this honorable court that all and every matter in the complainant's bill mentioned and complained of, are matters which may be tried and determined at law, and with respect to which the complainant is not entitled to any relief from a court of equity, and this defendant asks that *it* shall have the same benefit of this defense as if *it* had demurred to the complainant's bill."

MANDAMUS.

Section 1993, Compiled Laws of New Mexico of 1884 says:

"It may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station. * * *"

In *City of Litchfield vs. Ballou,* 114 U. S., 190, this court said:

"But the complainant insists that though the bonds are void, the city is bound, *ex acquo et bono,* to return the money it received for them. It therefore prays for a decree against the city for the amount of the money so received. There are two objections to this proposition: (1) If the city is liable for this money, an action at law is the appropriate remedy. The action for money had and received to the plaintiff's use, is the usual and adequate remedy in such cases. Where the claim is well founded, and the judgment at law would be the exact equivalent of what is prayed for in this bill, namely a decree for the amount against the city, to be paid within the time fixed by it for ulterior proceedings."

There was nothing to act on in the case at bar but the validity of the warrants issued under the contract, and that can be determined in an action at law.

State vs. City of Great Falls, 49 Pac. Rep., 15-22.

And the remedy by mandamus is ample to require the issuance of warants for anything to become due in the future.

Wood vs. Strother, 76 Cal., 545; 18 Pac. Rep., 766.

There is nothing in the allegation in complainant's bill (Trans. p. 6) that:

"It will become necessary to institute a multiplicity of suits upon the said agreement for the enforcement of payment of said semi-anual rentals."

Which is sufficient to give a court of chancery jurisdiction to hear and determine the case, unsupported by any proofs. Courts will presume that after a court of competent jurisdiction has adjudicated the matter in controversy, that the officers of the corporation will obey the mandates of the superior judicial tribunal.

Appellant has not exhausted its remedy at law.

It is shown by the bill and answer that for the year 1892 the total levy of taxes for all purposes was eight mills on the dollar, and for the year 1893, the total levy was six mills on the dollar (Trans. pp. 16 and 34).

Now, if the appellant's contract is valid it can proceed by mandamus and require additional levies up to the full limit of ten mills on the dollar; and thereby cause to be collected sufficient means to pay the full amount due it for water rents. This is a plain, speedy and adequate remedy provided by statute.

The charter of the City of Galveston contained a provision prohibiting the city from borrowing more than $50,000 for general purposes, and the city council entered into a contract for paving and grading the streets and sidewalks, and agreed to issue bonds of the city in payment therefor; and afterwards the city attempted to rescind the contract, and in a suit for damages by the contractors, in commenting on the power to contract, in the absence of any prohibitory provision in the charter, or general law or statute on the subject, as exists in the case at bar and did not exist in that case, and on the right to proceed by an action *for specific performance*, this court said, in *Hitchcock vs. Galveston*, 96 U. S., 341-353:

"There may be a difference between the case of an engagement made by a corporation to do an act expressly prohibited by its charter, or some other law, and a case of where legislative power to do the act has not been granted. Such a distinction is asserted in some decisions. But the present is not a case in which the issue of the bonds was prohibited by any statute. At most, the issue was unauthorized. At most, there was a defect of power. The promise to give bonds to the plaintiffs in payment of what they undertook to do was, therefore, at farthest, only *ultra vires;* and, in such a case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract."

Gas Company vs. Leadville, 9 Colo., Ct. Appeals, 400.
Leadville Water Co. vs Leadville, 22 Colo., 297.

It is contended by appellant that the territorial supreme court erred in dismissing the bill unconditionally, because it might be held as a bar to further proceedings.

It is certified (Trans. p. 66):

"That said warrants issued to complainant, as set forth in complainant's bill, were and are null and void, having been issued by the defendant's trustees in excess of the amount derived from a two-mills levy on each dollar of taxable property, and having thus been issued contrary to law and in excess of the authority conferred by law upon said trustees."

This certification is incorrect. What the court did hold and decide is as follows, to wit:

"We conclude that ordinance No. 10, and the contract made thereunder are not void, but that the language of section 11 of said ordinance that the said town agrees to levy and collect a tax sufficient, etc., means and should be construed as an obligation for the town to exhaust its power, if necessary, to collect a tax sufficient, etc., within the limit of levying two mills upon the entire taxable property within its corporate boundaries. This provision of the law is to be read into the ordinance and the contract thereunder."

The only facts which were necessary for the court below to find and certify are as follows, to wit:

"The court doth further find and certify that no evidence was offered or introduced by either of said parties in said cause in said district court or in said supreme court, and that said cause, by stipulation of the parties, was heard and determined in and by the said district court upon the said bill of complaint of said Raton Water Works Company and the answer thereto of the Town of Raton, and that the facts hereinbefore stated and certified by this court are found solely upon and from said bill and answer and exhibits therewith filed, as the same truly appear in the transcript of the record in said cause, duly filed in the said supreme court, upon the appeal taken thereto by the Town of Raton from the final decree, findings of fact, judgment, and decision rendered and made by the said district court in favor of said Raton Water Works Company, decreeing the specific performance by the Town of Raton of said ordinance No. 10, contract and agreement aforesaid, and which said final decree, finding of fact, judgment and decision of said district court were and are in words and figures as follows, to wit:"

And this would have fully complied with the act of congress, approved April 7th, 1874, which reads:

"Section 2. That the appellate jurisdiction of the supreme court of the United States over the judgments and decrees of said territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal according to such rules and regulations as to form and modes of proceeding as the said supreme court have prescribed or may hereafter prescribe:

Provided, That an appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the supreme court, together with the transcript of the proceedings and judgment or decree; but no appellate proceedings in said supreme court, heretofore taken upon any such judgment or decree, shall be invalidated by reason of being instituted by writ of error or by appeal." Supplement to the Rev. Stats. of the U. S., Vol. I, p. 13.

All the facts that were before the district court and the supreme court are found in the record here in the pleadings and exhibits, and any certification as to the pleadings and record is mere surplusage.

With respect to the force which should be given to the certified statement of facts by the court below.

It has been seen that this cause was heard and determined all the way through on bill and answer, and no evidence of any kind was offered on either side, and there are and were no disputed facts, and the same rule with respect to facts should apply as if it had been determined on demurrer.

Hitchcock vs. Galveston, 96 U. S., 341, *supra*.

Now, let us see just what the court below did decide, as follows, to wit:

In favor of appellant:

First. "It (the contract ordinance No. 10) does not constitute an indebtedness for the whole amount *in presenti*. It is a continuing contract from year to year, and is binding on both parties so long as the conditions therein are not broken (Trans. p. 48—opinion).

Second. "The trustees of the defendant town had no au-

thority to enact and enforce ordinance No. 64, passed May 23d, 1895, so as to in any manner change or effect the appropriation then existing for that fiscal year as provided for by ordinance No. 59, enacted in March, 1895, for the fiscal years 1895 and 1896, and is therefore void to that extent.

Third. "Ordinance No. 59 seems to have been passed in accordance with this statute, and should not be permitted to be changed, so far as its appropriations are legal by ordinance No. 64.

Fourth. "The trustees of the defendant town had no authority to pass and enforce ordinance No. 65, by which it was attempted to make town warrants issued after June 1st, 1895, receivable in payment of town licenses." (Trans. p. 49—opinion); 49 Pac. Rep., 898.

Against appellant:

Fifth. "We conclude that ordinance No. 10 and the contract made thereunder are not void, but that the language of section 11 of said ordinance that the said town agrees to levy and collect a tax sufficient, etc., means and should be construed as an obligation for the town to exhaust its power if necessary, to collect a tax sufficient, etc., within the limit of levying two mills upon the entire taxable property within its corporate boundaries. This provision of the law is to be read into the ordinance and the contract thereunder."

Sixth. "As the town has heretofore, it is undisputed, more than complied with its obligation by paying an amount in excess of what could have been derived from a two-mills levy, and as ordinance No. 64 provides for the entire proceeds of a two-mills levy being paid to the complainant, it is apparent its bill is without equity and should be dismissed." (Trans. p. 50.—opinion.)

Thus it is seen that appellant has only two grounds for error in this appeal.

The decision of the said supreme court was the law in this case as to those ordinances, and binding on the appellee until reversed or modified, and it is not asking for reversal of that decision.

Appellant contends:

"If ordinance No. 10 and the warrants issued under it are void (certificate, p. 66) the town is entitled to have the bill dismissed absolutely; but on the other hand if the ordinance and warants are valid, the water company is entitled either to relief in equity, or at least to have the bill dismissed without prejudice to an action at law.

Third. "If, therefore, ordinance No. 10 and the warrants issued under it are valid, it was error to dismiss the bill absolutely, and the judgment must be reversed and the cause remanded, even though it should be held that the water company ought to have brought an action at law instead of a suit in equity."

Appellee contends that if the court should be of the opinion that the warrants issued under ordinance No. 10 and for the collection of which a decree is sought in the bill, are valid, and that the decree dismissing the bill generally for want of equitable jurisdiction, might be construed as a bar to an action at law, then this court should affirm the decree of dismissal, with costs, with the modification that the dismissal is without prejudice to the rights of the appellant or the legal holders of said warrants to bring an action at law.

AUTHORITIES.

"The decree dismissing the bill absolutely must be so modified as to declare that it is without prejudice to an action at law, and so modified, it is affirmed with costs." *Lacassagne vs. Chapius,* 144 U. S., 119; 12 Sup. Ct., Rep., 659.

And again:

"It follows from what has been said that this court is of the opinion that the bill in the present instance did not state a case within the present instance, did not state a case within the equitable jurisdiction of this court, and that it was properly dismissed for that reason. We observe, however, that the decree dismissing the bill is general, and does not preserve to the appellant her right to sue at law, if she so elect. The case is therefore remanded to the circuit court with directions to add to the existing decree a clause that the dismissal ordered is without prejudice to the complainant's right to sue at law; and as thus modified, the decree below is affirmed, at the costs of the appellant."

Sanders vs. Devereux, 60 Fed. Rep., 311-315.

6 Ency. Pl. and Pr., 895, and cases there cited.

REPUDIATION OF THE CONTRACT.

Appellant contends that appellee is attempting to repudiate the contract entered into under ordinance No. 10. This is untenable, because the trustees of appellee did not

have the original power to enter into the contract to pay any more than the proceeds of a two-mills levy, and it is not denied that appellee has paid that, and more, every year to appellant, for water rents. There can be no repudiation of a contract where the original power to make it is wanting.

United States vs. Macon County, 99 U. S., 582.

If the trustees had the authority to make the contract and bind the inhabitants of the town in the face of a plain statute to pay more for water rents per annum than the entire proceeds derived from a ten-mills levy on all taxable property in the corporate limits, then it must be conceded that there was no limit on their powers to contract and bind the town, except, possibly, as to unreasonableness of consideration.

AUTHORITIES CITED BY APPELLANT.

Appellant cites and relies on the decision of this court in *United States vs. County of Clark*, 96 U. S., 211.

Let us see upon what that decision was based:

"It is not averred, and it could not be, that the county court has not power to levy a county tax beyond that authorized in the charter referred to for the statutes of the state make it the duty of the court to levy taxes for county uses not exceeding the rate of five mills or one-half per cent. The tax of one-twentieth of one per cent. is an authorized addition to this."

The question is thus presented, whether the relator is entitled to payment of his judgment out of the general funds of the county, so far as the special tax of one-twentieth of one per cent. is insufficient to pay it. And we think, that he is thus entitled is plain enough, unless the act which gave the county authority to issue the bonds directs otherwise. That act gave plenary authority to the county to subscribe to the capital stock of the railroad company and to issue bonds therefor. We quote it at length:

" 'It shall be lawful for the corporate authorities of any city or town, or the county court of any county, desiring so to do, to subscribe to the capital stock of said company, and

levy a tax to pay the same not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year.'

"It is to be noticed that the act imposed no limit upon the amount which it empowered a county to subscribe, and for the payment of which authority was given for the issue of county bonds. This was left to the discretion of the county court."

It is observed that this statute is very different from the New Mexico statute.

The court further says:

"There is no provision in the act that the proceeds of the special tax *alone* shall be applied to the payment of the bonds. None is expressed, and none, we think, can fairly be implied. It is no uncommon thing in legislation to provide a particular fund as additional security for the payment of a debt."

Now we have seen (paragraph seventy-one, sec. 1622) that the special tax of two mills on the dollar each year shall be applied to the payment of water rents.

And again:

"Why, then, must not the special tax of one-twentieth of one per cent, be regarded as merely an additional provision made for the payment of the new debt, authorized, rather than as a denial to creditors of any resort to the ordinary sources from which payment of county debts is to be made? Why should such a provision be construed as placing the holders of the bonds in a worse situation than that of other creditors of the county?"

The difficulties of applying these principles to the case at bar, are: (1) That that suit was a mandamus to compel a general levy to pay a debt, and the case at bar is one in chancery for a specific performance; and, (2) because it has been seen that our statutes are full of limitations and restrictions, not shown to exist in the Missouri statute; and, (3) because by paragraph seventy-one, section 1622, it is specially provided that if the town had constructed its own water works, then "at the regular time of levying taxes in each year, said city or town is hereby empowered to levy and cause to be collected, in addition to the other taxes authorized to be levied, a special tax on the taxable property

in said city or town, which tax, with the water or gas rents hereby authorized, shall be sufficient to pay the expenses of running, repairing and operating such works."

And the limitation of said special tax is two mills on the dollar, and this is the limit to which the town could have gone, and no further.

Then why should this statute be so construed as to place the inhabitants of this town in a worse situation than if it had constructed its own works? Or why should the statute be construed more favorable to appellant than to the inhabitants of the town? The construction should be fair alike to both the town and appellant. Or why should the constituted authorities of the town be permitted to enter into a general contract with the appellant water company, or any one else, by which all the revenues, and even more, will be consumed for one special purpose, and leave no money with which to pay other creditors of appellee town? It is submitted that the case referred to is not controlling in the cause at bar.

Appellant also cites and relies on the decision in *Water Works Company vs. City of Creston,* 101 Iowa, 687, on a statute, so far as it appears in the opinion, similar, but not exactly, to the New Mexico statute, in which it is held that the limitation in the statute in that state is on the power to tax, but not on the power to contract; and that if the proceeds of the special tax is insufficient to pay the water rents agreed to be paid, then the deficiency may be paid out of the general revenues.

In the opinion, the court said:

One hundred and eleven. "Said ordinance provides for levying a special tax in accordance with section 8, chapter 78, acts of fourteenth general assembly, and that, if the tax so levied and collected be insufficient at any time to pay the water rentals, as provided, as the same are earned, then the city hereby agrees to annually or semi-annually set apart in money out of its general funds and annual revenues, a sufficient sum or sums to keep up said water fund so that said water rentals can be promptly paid when due."

Here it appears that the city authorities contracted to

levy, collect and pay the proceeds of a special tax in the manner and for the purpose provided by the statute, and when the special tax proved insufficient, "then the city hereby agrees to annually or semi-annually set apart in money out of its general funds and annual revenues, a sufficient sum or sums to keep up said water fund, so that said water rentals can be promptly paid when due."

This is a very different ordinance and contract from the one under consideration in the cause at bar, which is as follows, to wit:

"Section 11. That the said Town of Raton shall pay to the said Raton Water Works Company or its assigns, as follows, to wit: On the first day of January and July of each and every year one-half of the aforesaid money and for all additional hydrants thereafter in like manner on the 1st day of January and July as aforesaid. The said town agrees to levy and collect a tax sufficient for the purpose of making said semi-annual payments for each and every one of the twenty-five years aforesaid, and in default of making said payment the said town shall pay interest on said semi-annual payments at the rate of ten per cent. per annum." (Trans. p. 21.)

Here, it will be observed, the contract was not made in contemplation of the payment of water rents ont of a special tax fund, but for a lump sum to be paid semi-annually, and with no intention or purpose or agreement to levy and collect a special tax as the law required, and an agreement to pay any possible deficiency out of the general revenues, as in the Creston case, *supra;* but only on condtion:

"That the said town agrees to levy and collect a tax sufficient for the purpose of making said semi-annual payments for each and every one of the twenty-five years aforesaid, and in default of making said payment the said town shall pay interest on said semi-annual payments at the rate of ten per cent per annum."

It is not disclosed by either the bill or answer, nor is it contended by appellant, that any special levy has ever been made as required by the statute to pay the water rents claimed to be due by appellant, and no special tax is called for in the contract, ordinance No. 10, but all payments have been made for water rents out of the general fund col-

lected out of the general levy for all purposes, which is limited (paragraph six, sec. 1622) to eight mills on the dollar.

The distinction drawn by the court in the Creston case, *supra,* that the limitation was on the power to levy the tax, and not on the power to contract, is but a distinction without a difference. If there was no power to provide means for the payment, it is difficult to understand where the authority rested to make the contract and obligate the town to pay water rents where it is admitted that one of the contracting parties, the town trustees, had no power to levy and collect a tax to meet its obligations agreed to be met.

This seems to be contrary to the principle announced by this court in *United States vs. Macon County,* 99 U. S., 582, where the court said:

"Thus, while the debt was authorized, the power of taxation was limited, by the act itself and the general statutes in force at the time, to the special tax designated in the act, and such other taxes applicable to the subject as then were or might be thereafter by general or special acts be permitted. No contract has been impaired by taking away a power which was in force when the bonds were issued."

And again, this court said, in *Nashville vs. Ray,* 86 U. S., 468:

"Their powers are prescribed by their charters, and those charters provide the menas for exercising the powers; and the creation of specific means excludes others. Indebtedness may be incurred to a limited extent in carrying out the objects of the incorporation. Evidences of such indebtedness may be given to the crdeitors. But they must look to and rely on the legitimate mode of raising the funds for its payment. That mode is taxation."

It is insisted by appellee that *Creston Water Works Co. vs. City of Creston, supra,* does not apply in this case.

Appellant insists that the appellee is attempting to impair the obligation of its contract in its passage and attempts to enforce ordinance No. 64 and No. 65, in violation of ordinance No. 59.

The only answer necessary to that contention is that the territorial supreme court sustained and found in favor of

appellant's contentions on all points made, except as to the power of the town trustees to enter into a contract to bind the town to pay more than the proceeds derived from a special two-mill levy (Trans. p. 49—opinion); and appellant cites in support of its contention:

New Orleans Water Works Co. vs. Rivers, 115 U. S., 674.

New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S., 673.

Walla Walla vs. Walla Walla Water Works Co., 172 U. S., 1, and others.

But appellee insists that that question does not enter into the cause at bar, nor do the authorities cited apply here.

The territorial supreme court (Trans. p. 48—opinion) held that the contract ordinance No. 10 did not constitute an indebtedness, and the appellee is bound by that opinion until reversed or modified, and no cross-appeal has been asked or taken from that decision.

CONCLUSION.

First. The decision of the court below should be affirmed on its merits; but if this court should entertain a contrary opinion, then:

Second. The decree of the court below should be affirmed for want of equitable jurisdiction; but if this court should entertain the opinion that the absolute dismissal of the bill might be pleaded in bar to an action at law, then:

Third. The decree of the court below should be modified and affirmed without prejudice to an action at law, with costs.

Respectfully submitted,

N. B. LAUGHLIN,

Counsel for Appellee, Santa Fe, N. Mex.

HENRY A. FORSTER, ESQ.,

Of Counsel for Appellant, 52 Wall street, New York.

RATON WATER WORKS COMPANY *v.* RATON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 272. Argued April 28, 1899. — Decided May 15, 1899.

The water works company contracted with the municipal corporation of Raton to construct and maintain water works for it, and the corporation contracted to pay an agreed rental for the use of hydrants for twenty-five years. The works were constructed, and the corporation issued to the company, in pursuance of ordinances, warrants for such payments falling due one in every six months. Subsequently the corporation repealed the ordinances authorizing payment of the warrants, and passed other ordinances in conflict with them, whereupon the corporation refused to pay the warrants which had accrued and others as they became due. Thereupon the company filed this bill to enforce the payments of the amounts of rental already accrued, and as it should become due thereafter. *Held*, That the remedy of the company upon the warrants was at law, and not in equity, and that the court below should have dismissed the bill, without prejudice to the right of the company to bring an action at law.

In August, 1895, the Raton Water Works Company, a corporation organized under the laws of the Territory of New Mexico, filed, in the district court of the county of Colfax, Territory of New Mexico, a bill of complaint against the town of Raton, a municipal corporation of that Territory.

It was narrated in the bill that a contract had been entered into, in July, 1891, between the water works company and the town of Raton, whereby the company agreed to erect and maintain water works and to supply the town and its inhabitants, and the town agreed to pay rental for the use of hydrants in certain amounts during a period of twenty-five years; that the water works company had fully performed and complied with the contract on its part, at an expenditure of $115,000; that the town, from time to time, made certain payments of rental for hydrants furnished; that on January 1, 1895, the town, in pursuance of ordinances, issued to the water works company in payment warrants of said town, of that date, and falling due one every six months, and aggregating several

thousand dollars. Each of said warrants was duly drawn on the treasurer of the town of Raton, signed by the mayor and countersigned by the recorder of said town; that in pursuance of law it was the duty of the treasurer of the said town to have and keep in his office a book to be called "The Registry of Town Orders," wherein should be entered and set down, at the date of the presentation thereof, each of said warrants, and to pay out of the funds of said town, in his hands for disbursement, the amount of each of said warrants, in the order in which the same were presented to him for payment; that, subsequently, the board of trustees of said town wrongfully and without authority of law, and in disregard of the contract rights of the water works company, undertook to repeal the ordinance in which the terms and method of payment for the rent of hydrants were prescribed, and to pass certain other ordinances in conflict with the preceding ordinances under which the rights of the company had accrued; that, in pursuance of the latter ordinances, the town treasurer refused to register warrants held by the company and presented for registration; that, in addition to the amount of said warrants, there will accrue and become due to the company semi-annually during the continuance of said contracts the sum of $1962.50; that said town refuses to pay the said several amounts heretofore accrued and payable, and refuses to pay the said several amounts which will hereafter accrue, and gives out and pretends that the said contract is inoperative and invalid, and refuses to perform the same on its part, although in the possession, use and enjoyment of the said water plant under said contract.

The bill prayed that the town of Raton should be decreed specifically to perform the said contract, and to pay the amounts of said rental which had theretofore accrued and become payable, and might thereafter accrue and become payable, in pursuance of the terms of the contract, and should be enjoined from enforcing said repealing ordinances.

The defendant, in its answer, admitted the making of the contract, the performance thereof by the company; that the board of trustees issued to the company the several warrants, drawn in manner, amount and number as alleged in the bill;

that it was the duty of the treasurer of the town to keep in his office a book of registry, but denied that it was the duty of the treasurer to enter and set down, at the date of the presentation thereof, each of said warrants, and to pay out of the funds of the town in his hands for disbursement the amount of each of said warrants in the order in which the same were presented, or in any other order, said warrants being illegal, null and void. Also admitted the passage of the original ordinance prescribing the method of payment of rental by the issuance of warrants, and the passage of the repealing ordinance complained of, and that it has been and now is in the possession, use and enjoyment of the water plant of the water works company. The answer likewise admitted that it has given out that said contract, so far as it calls for the payment of $1962.50 semi-annually, is inoperative and invalid, and that it has refused to pay said sum semi-annually.

By way of defence, the answer alleged that defendant, as a municipal corporation of the Territory of New Mexico, is authorized by law to levy each year and collect a special tax sufficient to pay off the water rents agreed to be paid to the complainant, provided that said special tax shall not exceed the sum of two mills on the dollar for any one year; that said alleged semi-annual rental of $1962.50 claimed by the complainant is far in excess of the amount derivable from a two-mill tax levy on the assessed value of property subject to taxation within said town of Raton, and that said rental, so far as it is in excess of the proceeds of such a tax levy, is illegal; that said original ordinance, so far as the same imposes upon the defendant the obligation to pay complainant an annual sum greater than the proceeds of a two-mill tax, or to impose a tax levy greater than said rate, was and is null, void and inoperative, the same having been made and entered into by defendant's trustees in violation of law and in excess of the powers conferred upon them by the statutes of New Mexico; and that the warrants issued to complainant were and are null and void, because issued in excess of the amount derivable from a two-mill tax levy on each dollar of taxable property.

Having thus answered, the defendant pleaded "that all and every the matters the complainant's bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the complainant is not entitled to any relief from a court of equity, and this defendant asks that it shall have the same benefit of this defence as if it had demurred to the complainant's bill."

The cause was heard on bill and answer, and in September, 1896, the said district court entered a decree in accordance with the prayer of the bill, decreeing that the said original ordinance, contract and agreement should in all things be specifically performed by and on the part of the town of Raton, and that the town should issue and pay the warrants out of any funds or moneys in the treasury of the town, whether derived from general or special taxes. From this decree an appeal was taken to the Supreme Court of the Territory, where the decree of the lower court was reversed and an order was entered directing the lower court to dismiss the bill at the cost of the water works company. The cause was then brought to this court on an appeal from the decree of the Supreme Court of the Territory.

Mr. Henry A. Forster for appellant.

Mr. N. B. Laughlin for appellee.

Mr. Justice Shiras, after stating the case, delivered the opinion of the court.

The water works company, when it filed its bill in this case, was in possession of warrants that had been issued to it by the town of Raton in pursuance of the provisions of a contract existing between the company and the town. Those warrants were in the form of drafts drawn on the treasurer of the town, signed by the mayor and countersigned by the recorder of the town. They were for specific sums of money, payable at fixed periods, bearing interest from date, and some of them past due when the bill was filed.

In short, the warrants, if valid, were legal causes of action enforceable in a court of law. The defendant did not waive the question, but averred in its answer that the matters complained of in the bill were matters which could be tried and determined at law. And the Supreme Court of the Territory in its opinion says: "If the warrants, upon which payment is sought here, are valid, an action at law is the proper remedy to enforce their payment. They have been issued and are claimed to be outstanding obligations against the defendant town, and it says they are void, and therefore declines to pay them. Then, if in an action at law judgment should be in favor of the legal holders, and defendant's trustees should decline to provide for their payment, mandamus would be the proper remedy to compel the necessary levy."

In this state of facts we think the courts below erred in considering and determining the legal controversy in a suit in equity, but should have dismissed complainant's bill without prejudice to its right to bring an action at law. *Barney* v. *Baltimore*, 6 Wall. 280; *Kendig* v. *Dean*, 97 U. S. 423; *Rogers* v. *Durant*, 106 U. S. 644.

Accordingly, and without expressing or implying any opinion of our own on the merits of the controversy —

The decree of the Supreme Court of the Territory is reversed and the cause is remanded to that court with directions to amend its decree by directing the district court to dismiss the bill without prejudice to the right of the complainant to sue at law.